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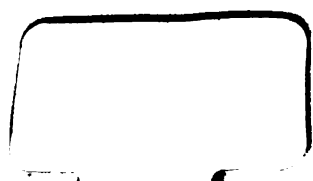
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THE
MINING REPORTS.

CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN, ENGLISH AND CANADIAN REPORTS
CHRONOLOGICALLY ARRANGED

WITH NOTES AND REFERENCES.

BY

R. S. MORRISON AND EMILIO D. DESOTO,

OF THE COLORADO BAR.

VOL. XXI.

CHICAGO:

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MINING REPORTS

VOL. XXI.

HEBER M. WELLS v. M. W. DAVIS ET AL.

(22 Utah 322; 62 Pac. 3. Supreme Court. July 21, 1900.)

¹Liberal construction to miner's notice. The law will not hold the locator of a mining claim to a strict and technical observance of the statute in respect to the terms of his notice, so long as he substantially complies with its requirements; and if it appears that the location was made in good faith, and by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient.

Trial to the court. When a cause is tried before a judge sitting without a jury, and a clear preponderance of competent, relevant, and material evidence supports the findings, the appellate court will not reverse because of errors in the court below in admitting incompetent, irrelevant, or immaterial evidence; for the presumption in such case is that it was wholly disregarded.

Question to expert. While it is true that an expert cannot be asked to give his opinion based merely upon the testimony heard by

¹*McCann v. McMillan*, 21 M. R. 6.

Call for one or more adjoining or neighboring claims makes a good description. *Seidler v. Lafave*, 4 N. Mex. 369; 20 Pac. 789. *Riste v. Morton*, 20 Mont. 139; 49 Pac. 656.

A mine is a permanent monument and therefore a good tie. *Kia-*

him, whenever there is a conflict in such testimony, yet, when the material facts are within such expert's own knowledge, and related by him in his own testimony, he may give an opinion based wholly upon such personal examination and knowledge, without having such facts hypothetically stated.

(Syllabus by the Court.)

Appeal from District Court, Salt Lake County; Ogden Hiles, Judge.

Action by Heber M. Wells against M. W. Davis and C. H. Lashbrook. Judgment for defendants, and plaintiff appeals. Affirmed.

FERGUSON & CANNON, for appellant.

DEY & STREET, for respondents.

ROLAPP, District Judge. The respondents in this case made application before the United States land office at Salt Lake City for a patent for the Mountain Mayd and Gold Reef mining claims, situated in West Mountain mining district, Salt Lake county; and the appellant thereupon filed an adverse claim in such land office, claiming a title to certain mining ground called the "Wells Lode," in conflict with the ground included in the respondents' application for patent. In support of such adverse claim, the appellant brought this action to determine his title to the mining ground in conflict. The respondents in their answer deny the appellant's right

ney v. Fleming, 20 M. R. 13. *Morrison v. Regan*, (Idaho) 67 Pac. 955; 22 M. R. —.

Party disputing existence of the claim called for as a tie has the burden of proof. *Shattuck v. Costello*, (Ariz.), 68 Pac. 529; 22 M. R. —.

Brown v. Levan, 4 Ida. 794; 46 Pac. 661, which is almost the only case ever decided to the contrary of the citations to this note, was overruled in *Morrison v. Regan*, *supra*.

or title to the ground, and set up affirmatively that they were the owners of the land, and pray for an adjudication and judgment to that effect. The cause was tried by the court, sitting without a jury, and was decided in favor of the respondents, and from such judgment the appellant appeals to this court.

For a reversal of the judgment the appellant relies upon two points: First, that the respondents' notices of location were insufficient, indefinite, and uncertain, and that therefore it was error to admit such notices in evidence; and, second, that the respondents were erroneously permitted to show by expert testimony that certain work done by respondents had a tendency to develop both of the mining claims belonging to them, especially when it was not shown that such expert witness had a personal knowledge of the course of the veins, although he generally knew and had surveyed the mining ground in question.

As to the first point, we think it wholly untenable. The notices of location read as follows:

"Mountain Mayd Relocation of the Mountain Mayd Lode. Notice is hereby given that the undersigned, citizen of the United States, has this the 14th day of November, A. D. 1878, relocated and reclaimed the location formerly known and recorded as the Mountain Mayd, and located on the 14th day of November, A. D. '73, and recorded in Book I of Locations, page 154, on the 14th day of November, A. D. 1873; the said Mountain Mayd not having the required amount of work done thereon to comply with the laws of congress and this district; the said Mountain Mayd lode being situated on the south-east side of Carr Fork, about 150 feet above the Levant lode, between Log and Carr Forks, about 300 feet from the creek, in the West Mountain mining district, Salt Lake county, Utah territory, and running 500 feet northeasterly and 1,000 feet southwesterly from the notice monument and discovery shaft, with 100 feet on each side of the vein, and along its course, to the extent of this location, with all its variations. M. W. Davis."

"Gold Reef Lode. I, the undersigned citizen of the United States, claim 1,500 lineal feet on this lode, ledge, or rock in place, bearing precious metals, following the course and width of the same, with

all its dips, spurs, angles, and variations, commencing at this monument as an initial point, and running 300 feet northeasterly and 1,200 feet southwesterly, situated between Muddy and Log Fork Gulches, under a certain prominent reef of rocks, and about 250 or 300 feet southwesterly from the southwesterly end of the Bonham lode survey, hereby relocating all old claims inside the boundaries of this claim subject to relocation, together with 100 feet on each side of said lode, with all the rights and privileges guaranteed by laws of the United States, as well as by the rules and regulations of this West Mountain mining district, county of Salt Lake, and territory of Utah. This location is made in the name of the Gold Reef location this 14th day of November, '78. M. W. Davis."

We think these location notices are more than ordinarily definite. It is true that they might have been improved if prepared by or under the direction of an experienced mining lawyer; but the law will not hold a locator to a strict and technical observance of the statute, so long as he substantially complies with its requirements. Says Chief Justice Bartch in the case of *Farmington M. Co. v. Rhymney Co.*, 20 Utah, 363, 58 Pac. 832: "Where the location was evidently made in good faith, we are not disposed to hold the locator to a very strict compliance with the law in respect to his location notice. If, by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient."

Nor do we think that appellant's second point is well taken. The record in this case discloses that testimony was introduced tending to prove a description of the veins and the course and situation of the work done with relation to the lodes, together with a clear preponderance of the testimony as to the value and tendency of said work to develop the respondents' mining claims. Under such circumstances, it cannot be reversible error to admit additional testimony upon such matter, even if such additional evidence should be incompetent, because this court has repeatedly held that: "When the judge tries the case without a jury, it is not re-

versible error to admit incompetent, irrelevant, or immaterial evidence; for he decides the case on the proper testimony only, and disregards utterly that which is incompetent, irrelevant, and immaterial. When a clear preponderance of competent, relevant, and material evidence supports the findings of the court, this court will not reverse because of errors of the court below in admitting incompetent, irrelevant, or immaterial evidence; for the presumption in such case is that it was wholly disregarded." *Victoria M. Co. v. Haws*, 7 Utah, 515, 27 Pac. 695; *Maynard v. Association*, 16 Utah, 145, 51 Pac. 259. Moreover, the testimony in this case discloses that the expert, Gorkinski, was not only a well-qualified mining expert, but he had personal familiarity with the mining ground in question, and had surveyed and knew the location of the shafts where the development work was claimed to have been performed; and while it is true that an expert cannot be asked to give his opinion, based merely upon the testimony heard by him, whenever there is a conflict in such testimony, yet, when the material facts are within such expert's own knowledge, and related by him in his own testimony, he may give an opinion based wholly upon such personal examination and knowledge, without having such facts hypothetically stated. *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *Schmieder v. Barney*, 113 U. S. 645. We find no error in the record, and the judgment of the lower court is affirmed, with costs against appellant.

BARTCH, C. J., and MINER, J., concur.

J. C. McCANN ET AL. V. J. C. McMILLAN ET AL.

(129 California 350; 62 Pac. 31. Supreme Court. July 30, 1900.)

Voluntary abandonment with friendly relocation to prevent forfeiture.

When an owner at the close of the year, having failed to do his annual labor proclaimed an abandonment and at once went through the form of a relocation in the name of an absent friend: *Held* a void proceeding as against a bona fide relocation made on the first of January following.

Lode location held good as placer. A record of a claim of the length and width of a lode claim, stating that it is "for Borate mining purposes," is good as a record of a placer claim.

¹**Location notices are to be liberally construed**—bounding on one adjoining claim and general topographical reference held good.

The claim must be marked upon the ground, but its record is not required to recite or state such fact.

Where district records are produced by the proper custodian and both parties tendered location notices filed with the same district recorder, there is sufficient proof of the existence of the district and of its rule requiring a record.

Department 1. Appeal from Superior Court, San Bernardino County.

Action by J. C. McCann and others against J. C. McMillan and C. H. Barkley. From a judgment for plaintiffs, and from an order denying a new trial, defendant Barkley appeals. Affirmed.

¹*Farmington Co. v. Rhymney Co.* 20 Utah 363; 58 Pac. 832. *Wells v. Davis*, 21 M. R. 1. *Fissure Co. v. Old Susan Co.* 21 M. R. 125. *Talmadge v. St. John*, 21 M. R. 13. *Morrison v. Regan*, (Idaho) 67 Pac. 955; 22 M. R. —.

Location certificate is admissible although its lines fail to close. *Providence Co. v. Burke*, 19 M. R. 625.

A location certificate in Montana which does not give the statutory description of the discovery shaft is void. *Hahn v. James*, 29 Mont. 1; 73 Pac. 965.

For cases where the tie is to neighboring claims, see *Wells v. Davis*, 21 M. R. 1 and notes.

REDDY, CAMPBELL & METSON, for appellant.

L. M. SPRECKER, and ROLF & ROLF, for respondent.

THE COURT. Plaintiffs brought this action to quiet their title to three mining claims, known as the "Compromise," "Handy," and "Sixteen to One," situate in Calico mining district, San Bernardino county. Findings and judgment were for the plaintiffs, and defendant Barkley appeals from the judgment, and from an order denying his motion for a new trial. Defendant McMillan answered, disclaiming all interest in the property involved.

A general outline of some material facts is essential to a comprehension of the points in controversy:

Prior to January 1, 1896, H. B. Stevens and Eugenia D. Porter located certain mining claims, covering the same ground now claimed by plaintiffs, under locations made by themselves on January 1, 1897, the validity of which is the ultimate question here involved. No assessment work was performed by the prior locators during the year 1896 on any of the claims. On December 28, 1896, said Stevens and Porter sold and conveyed their said claims to the defendant McMillan. On December 30, 1896, McMillan and one C. E. Calm went upon said claims, and, as claimed by defendants, abandoned them, and afterwards, upon the same day and the next, relocated them for and in the name of defendant Barkley. Plaintiffs made their alleged locations on the morning of January 1, 1897, assuming that the ground was then open to location.

Plaintiffs' title is controverted by appellant on each of two principal grounds, which will be noticed in their order:

1. That the ground in controversy was not open to location by the plaintiffs, because of the locations made for defendant Barkley on December 30, 1896.

That the locations made prior to 1896, and which were

conveyed by Stevens and Porter to McMillan on December 28, 1896, were at that time valid locations, is not questioned, and, but for the alleged abandonment of them by McMillan on December 30th, would have continued to be valid until midnight of December 31st, when the ground would become forfeited and vacant because no assessment work was done for the year 1896. The court found that the ground was not vacant at the time the Barkley locations were made, but was vacant on January 1, 1897, when plaintiffs made their locations, and therefore found, in effect, that there was no abandonment of the claims by McMillan on December 30th, but that he forfeited them by failing to do the assessment work on them, which failure left them vacant on January 1, 1897.

We think the finding that there was no abandonment is justified by the evidence. "Abandonment," as was said in *Myers v. Spooner*, 55 Cal. 260, "is a question of intention, and of this intention the jury were to judge in view of all the facts and circumstances of the case. It is true, as stated in the brief of counsel for appellants, that Leathe testified at the trial that there was no intention by him or his co-locators to abandon the claims. But his testimony to that effect was not conclusive." They knew when they purchased the claims that the assessment work for 1896 had not been done, and that their title would expire with the expiration of the year. They intended, as was explicitly stated, to relocate for themselves; but to wait until January 1st would expose the claims to location by others who had an even chance with them. They could not relocate before in any one's name without an abandonment, and to say to each other that they abandoned, and within 10 minutes, and without leaving the ground, locate them in the name of a person in New York, and thus burden an absent friend with mining claims which they assert were not, to them, worth doing the assessment work upon, is at least improbable. But we find at the conclusion of Mr.

Calm's testimony the statement: "When I went on the ground on the 22d of January I did not look for tools. We had men on the ground at that time, and, if I had seen tools, they might have been theirs. I did not notice whether there were any tools there that did not belong to us or our men."

Who the witness meant by "we" or "us" is not stated. It nowhere appears that Barkley was at any time informed of the location having been made, or that he gave any directions or authority to have any work done. McMillan, by his answer, disclaimed all right, title, or interest in said claims or either of them; but he testified that he was there in January and April, 1897, and did work on the Mars in April of that year; that the Dauntless and Minerva also had work done upon them in 1897,—and added, "I was there in possession of those claims;" that work was done in January and February; and that he was there in possession, doing the work, when the injunction was served.

McMillan further testified that he was on those claims on December 31st, the day after the alleged abandonment; that "There was no way of getting in there, except on horseback, and I went to see if I could find a good place for a wagon road;" and that he was there on January 16th, also.

Barkley's deposition was not taken, nor was there any evidence that he was ever informed that these mining claims were located in his name, or that work was being done for him, or that Calm or McMillan were his agents. Barkley's answer was verified by McMillan, but even that he did not do as agent, but as one of the defendants in an action in which he disclaimed all interest.

We have gone into this matter thus fully because of the direct testimony of McMillan and Calm to the alleged abandonment. It was for the trial court to determine the fact, and we think the circumstances justify the conclusion that there was no abandonment.

2. Appellant further contends that plaintiffs have not shown title, because "there was no proof that the ground contained veins or lodes of mineral-bearing rock in place."

It is said that the ground contained a deposit of borate material or borax, and that such deposits cannot be located as lode claims, but only as placer claims.

The locations made by plaintiffs or their predecessors in interest do not profess to be lode claims, or that they contain veins or lodes of mineral-bearing rock in place.

The notices are "that we, the undersigned, have this day located this ground for borate mining purposes," and describe claims 1,500 feet long and 600 feet wide, while appellants' locations describe them as lode claims.

But the point made is immaterial. It is said in Lindley on Mines (section 432) "that, generally speaking, the acts required to be performed in order to complete a valid location under the federal laws applicable to placers are the same as required in cases of lode locations." See, also, section 2329, Rev. St. U. S. Appellant does not point out any defect in respondents' notices as notices of placer claims, and we perceive none.

It is further contended that the certificates or notices of location of respondents' mining claims do not describe them with reference to natural objects, or permanent monuments, nor describe them as being distinctly marked on the ground, so that the boundaries could be readily traced.

We think the reference in plaintiffs' location notices to natural objects or permanent monuments is sufficient. The Compromise location states that it is "bounded on the east by the Handy mine, and is one-quarter mile south of Borax road, and about three miles east of the town of Calico." The others are similarly described.

The defendant's notices similarly describe his locations. It may be presumed that, if there were natural objects or permanent monuments that would better identify the location of

these claims, both plaintiffs and defendant would have referred to them. Notices of location are to be liberally construed. *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361.

As to the other branch of the objection, the statute does not require the record of a mining claim to show that it is distinctly marked on the ground, so that its boundaries can be readily traced. The claim must be so marked upon the ground, but the statement that it is so marked is not required to be inserted in the record. Rev. St. U. S. § 2324.

Upon the trial the plaintiffs offered in evidence what purported to be the record of their said mining claims, recorded in a book purporting to be the records of the Calico mining district. This record was produced by the county recorder of said San Bernardino county. Objection was made by defendant that the record must be accompanied by proof that there was such a district, that there was a rule or custom providing for a record, and that the book was kept by the lawful custodian of it.

This cause was tried while the mining act approved March 27, 1897, existed and was in force; and that act provided that the records of all mining districts should be transmitted to the county recorder of the respective counties in which the districts were situated, and that "thereafter copies of such records, certified by the county recorder, may be received in evidence with the same effect as the originals."

These records were produced by the county recorder, the proper custodian. It was alleged in the complaint that these mining claims were situated in Calico mining district, and the allegation was not denied. It was also alleged in the complaint that H. R. Gregory was the duly-acting recorder of said district, and there was oral evidence that he was such, and that the notices of location were left with him to be recorded, and the record of the locations was signed by him as such recorder. This evidence was corroborated by the defendant, who introduced the same book from the custody of the

same officer to prove the recording of his claims, and these records were made by the same district recorder, who was repeatedly spoken of by defendant's witnesses as the recorder of said district. If there were any defects in plaintiffs' evidence upon this point, we think it was supplied by the defendant; and the production of volume 3 of the records of said district; as well as the fact that defendants, as well as plaintiffs, immediately procured their respective notices of location to be recorded by the recorder of said district, is at least some evidence that there was a rule or custom requiring it.

Our conclusion is that the findings are justified by the evidence, and that there are no errors which would justify a reversal of the judgment. The judgment and order are affirmed.

Hearing in bank is denied.

W. S. TALMADGE ET AL. V. A. C. ST. JOHN ET AL.

(129 California 490; 62 Pac. 79. Supreme Court. August 2, 1900.)

Indulgent construction. A miner's posted notice is to be liberally construed.

Name of county omitted. Where the preliminary notice named the county and the final certificate referred to the preliminary notice the fact that the final certificate omitted to name the county will not defeat the object of the notice.

¹**A description by its own stakes and monuments,** without reference to other object or monument, held sufficient.

²**The actual and visible prior occupation of the premises with boundaries defined by stakes** avoids the attempted location of the later claimant.

Department 2. Appeal from Superior Court, San Bernardino County. FRANK F. OSTER, Judge.

Action by W. S. Talmadge and others against A. C. St. John and others for the possession of certain mineral lands and for an injunction. There was a judgment for plaintiffs, and from an order granting defendants a new trial, plaintiffs appeal. Affirmed.

¹Calls for its own posts and a general statement of locality held good. *Bramlett v. Flick*, 20 M. R. 103.

A vague reference to distance from a lake and river in connection with its own posts held sufficient description. Call in plaintiff's certificate for defendant's claim as a tie or neighbor considered. *Credo Co. v. Highland Co.* 95 Fed. 911.

Easterly and westerly do not mean due east and west. A location notice using these terms holds the ground for the distance claimed to 45° to north or south. *Wiltsee v. Arizona Co.* (Ariz), 60 Pac. 896.

See *Providence Co. v. Burke*, 19 M. R. 625, and notes.

²But location without a discovery of mineral does not prevent an entry upon same ground of a later prospector. *Miller v. Chrisman*, 140 Cal. 440; 73 Pac. 1083.

CHAS. L. ALLISON, ROLFE & ROLFE, and C. C. HASKELL,
for appellants.

GOODRICH & McCUTCHEN, and HARRIS & GARRETT, for respondents.

HENSHAW, J. This is an appeal by plaintiffs from an order of the court granting defendants' motion for a new trial. The action was instituted by plaintiffs to recover possession of certain mineral land, for an injunction restraining defendants from extracting ores, and for damages. The following facts were disclosed, without conflict, in the evidence: On the 10th day of October, 1898, the defendant St. John and others, prospecting for precious metals upon the public domain of the United States, discovered gold-bearing rock in place, and with the purpose of appropriating the same erected at the point of discovery a prominent and substantial stone monument, more than 3 feet high, and more than 2 feet in diameter at the base, and posted thereon their preliminary location notice, claiming 1,500 feet in an easterly direction along the course of the lead, and 300 feet on each side, naming the claim the "Blue and the Gold Mine." In their preliminary notice they gave the date of discovery, the date of the location, and the county in which the claim was located. This notice was properly signed, and on the 26th day of October, 1898, was recorded in the office of the county recorder of San Bernardino county. About two weeks later they constructed monuments upon the boundaries of the claim, building a monument at each corner and at the center of each end line, placing notices in each monument stating what corner of the claim it marked. The monuments were substantially built of stone, and were generally of the size of the one above given. In the discovery monument first constructed they placed their second notice, designated: "Cer-

tificate of Location. Quartz Claim. Second or Completed Notice."

This last notice gave the name of the claim, the names of the locators, the date of the discovery, and the fact that the notice was posted on the claim on the 10th day of October, 1898, as provided in section 2 of an act of the legislature of the state of California entitled "An act prescribing the manner of locating claims upon the public domain of the United States, recording notices of location thereof, amending defective locations," etc. St. 1897, p. 215. This notice was sworn to by defendant A. C. St. John on the 29th day of November, 1898, and recorded on the same day in the records of San Bernardino county. The locators began their work on the claim on the 27th day of October, 1898, and worked from that time on continuously until the 21st day of January, 1899, when work ceased under an injunction issued by the superior court of San Bernardino county at the instance of these plaintiffs. On November 18, 1898, they had moved on to the claim, and were living in a tent near their discovery monument. The value of the work performed by them prior to the issuance of the injunction was about \$250. On the 27th day of December, 1898, the locators were absent from the claim, having gone to Los Angeles to spend the holidays with their families. Their tools, tent, and bedding, however, still remained on the claim, and they left one A. H. Jennings, an employé, in charge of it. On that day the plaintiff W. S. Talmadge and O. M. Potts went upon the ground, and made an asserted discovery of ore in place at the point where the defendants had been at work. They constructed a substantial monument on the dump, made of ore which had been extracted by the defendants. They placed in it a preliminary location notice, which was recorded on the 30th day of December, 1898, in the records of San Bernardino county. At the time they built their monument and posted their notice, plaintiffs had heard the defendants had

done work at the dump upon which their monument was constructed. They saw the tent, and on the morning of the following day they saw Jennings at the tent. They did not look for any monument on the 27th, but on the following day found the east and west end monuments of defendants' claim. Jennings tore down the notice put up by Talmadge on the 27th, and Talmadge replaced it on the morning of the 28th. At the time of their entry, Talmadge was armed with a rifle, and Potts, apparently, was carrying a pistol. Between the 6th and 13th days of January the plaintiffs did \$50 worth of work within the boundaries of the ground claimed by them, which is substantially the ground covered by defendants' location. They named their claim the "Cardinal." When they went upon the ground to do their work, St. John, Williams, and Jennings were there, and told plaintiffs that they objected to work being done, and stated that they claimed the ground. On the 13th of January, Talmadge posted another preliminary notice at the same place where he had posted the notice on the 27th of December, and built a new monument because the earlier monument had been destroyed. At the same time he posted his final notice of location, which notice, sworn to by him, was duly recorded in the records of San Bernardino county. At the time of posting the final notice of location the defendants had constructed monuments upon the Cardinal claim sufficient to define its boundaries so that they could be readily traced.

Defendants moved for a new trial on the ground of the insufficiency of the evidence to justify the decision, that the decision was against law, and for errors of law occurring at the trial. Upon this appeal it appears that defendants were the prior locators, and that the notices of plaintiffs, who were subsequent locators, are unimpeachable in form. Plaintiffs' rights, then, depend primarily upon the question of the sufficiency or insufficiency of the prior notices filed and recorded by defendants: for, if defendants' notices sufficiently comply

with the law, their possessory right to the land in question against these plaintiffs may not be disputed. In rendering judgment the trial court seems to have been of opinion that these notices were legally insufficient. A modification of its views in this regard led to the granting of a new trial, as appears from the fact that this question, and this question alone, is here argued by the parties.

By section 2324 of the Revised Statutes of the United States, all records of mining claims hereafter made are required to contain the names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. By section 3 of the act of the legislature of this state approved March 27, 1897 (St. 1897, p. 215), it is required that the certificate to be recorded shall state "(4) a description of the claim defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural object or permanent monument as will identify the claim." It is urged that the notice recorded by the defendants failed in two essential particulars to comply with these laws, and is therefore, void. First, it is insisted that it fails to mention either the state or county of the purported location. The final notice of defendants, as recorded, is irregular in this particular, but in this respect does not differ from the notice considered by this court in *Carter v. Bacigalupi*, 83 Cal. 187, 23 Pac. 361, where it is said: "The notion that, where the part of the vein or lode which is claimed is sufficiently described in the recorded notice, the phrase 'this vein or lode' is not sufficient, unless accompanied with the information that the vein or lode in question is within a particular district, county, or state, is one that might arise in the mind of a lawyer, but would not be apt to occur to a miner. * * *

In construing notices like this, it must be remembered that, as a rule, miners are unacquainted with legal

forms and requirements, and are frequently out of the reach of assistance; and, in view of this, it has been wisely held that their proceedings are to be regarded with indulgence, and liberally construed. In this case we think that the notice was sufficient, both as posted and recorded." Moreover, the final notice in this case makes reference to the preliminary notice posted as required by law, and recorded in the records of San Bernardino county, and this preliminary notice named the county in which the claim was located.

The second contention against the validity of defendants' notice is that the description is inadequate, and that the law requires that the notice shall contain not only a description of the exterior boundaries as marked upon the ground, but also such a description as will, in addition, identify the claim by reference to some natural object or permanent monument. The description in question locates the claim as "commencing at a monument at the center of the West end line thence running Northerly 300 feet to a stone monument at the N. W. corner thence 1500 feet Easterly to a stone monument being the N. E. corner thence Southerly 300 feet to a stone monument, being the center of the East side line thence Southerly 300 feet to a stone monument being the S. E. corner thence Westerly 1500 feet to a stone monument being the S. W. corner thence Northerly 300 feet to the point of beginning." As is said in *Mt. Diablo M. Co. v. Callison*, 5 Sawy. 439: "The object of any notice at all being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably should be held a good notice. Great injustice would follow if years after a miner had located a claim, and taken possession and worked upon it in good faith, his notice of location were to be subjected to any very nice criticism." In this notice the exterior boundaries are described and the corners of the claim fixed by reference to permanent stone monuments. We do not think that, in the particular matter

under consideration, the statute of this state requires more than is required by the Revised Statutes of the United States. Both laws require a description by reference to some natural object or permanent monument, such as will identify the claim. Touching this requirement, Judge Sawyer, in the *North Noonday Case*, 6 Sawy. 299, 1 Fed. 522, says: "The natural objects or permanent objects here referred to are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object, and such permanent monument may consist of a permanent post or stake firmly planted in the ground, or in a shaft sunk in the ground." The stone monuments referred to in this notice were certainly within the interpretation of the statute thus given, and universally followed.

Moreover, when the plaintiffs went upon this mining ground they were confronted with ample evidence touching its occupancy and prior location. The tent, bedding, and tools of the defendants were there. Jennings, an employé, was holding possession for them. The monuments erected by defendants could have been seen, and should have been seen, and in fact were seen. As was said by this court, under a similar state of facts, in *Newbill v. Whitfield*, 63 Cal. 81: "At all events, when the defendants went on the ground on the 16th and 17th days of July, 1881, they found, or could have found if they had looked, the monuments—eight in number—erected by Wallace, Parks, and Ferrell on the 12th of April, with the notices above indicated. Those boundaries included the premises in controversy. From them the defendants saw, or ought to have seen, that the ground was appropriated by others, and was not open to location by them."

The order appealed from is therefore affirmed.

TEMPLE, J., and MCFARLAND, J., concurred.

BERNARD CONWAY ET AL. V. ED. L. HART.

(129 California 480; 62 Pac. 44. Supreme Court. August 8, 1900.)

¹Prior locator prevails. The cardinal principle which governs the conflicting claims of parties appropriating the public domain is, other things being equal, that the prior locator prevails.

The locator may adopt old stakes found on the ground which stand in the proper places.

²Indirect proof of discovery. Proof that a shaft had been sunk 25 or 30 feet deep and the witnesses speaking generally of the vein being there and of "rich rock" and "gold bearing rock" being found within the lines, though indirect, amounts to sufficient proof of a discovery within the claim.

Proof of public unoccupied domain. Evidence that before the first location of plaintiffs' claim the land was unoccupied by anybody, and was vacant government land; that before their second location plaintiffs worked the claim for several years, placed stakes around it, sunk a shaft, and took out rock; and that when they made the second location they found the stakes, shaft, and claim in substantially the same condition as when they left it,—is sufficient to show that the land was vacant public land when the second location was made, as against a subsequent locator asserting no title antedating his location.

Plaintiffs allowed to recover after contract of sale. Where plaintiffs had made a deed of the property in contention to Z. and Z. gave a deed back to them which was held in escrow under conditions expressed in a written contract, the three papers are to be construed together and the transaction was held not such a transfer of title as to prevent their recovery in ejectment.

Change of stakes by one co-owner. One of the owners, without consultation with his associates, after conversation with defendants,

¹The first valid location takes the ground. *Lockhart v. Johnson*, 181 U. S. 527. *Copper Globe Co. v. Allman*, 21 M. R. 296. *Gregory v. Pershbaker*, 15 M. R. 602. *Miller v. Chrisman*, 140 Cal. 440; 73 Pac. 1083. Mining Rights 11th Ed. 80.

Parties made a location valid to the extent of the Congressional requirements but failed to comply with the State Statute then in force. The State Statute was repealed while the locators continued in possession: *Held*, that upon the repeal the location became valid. *Dwinnell v. Dyer*. — Cal. —; 78 Pac. 247.

²*Yreka Co. v. Knight*, 21 M. R. 478.

placed three stakes to indicate one of the lines of the claim. The other co-owners knew nothing about these stakes and the one who placed them shortly afterwards repudiated them: *Held*, no estoppel to claim beyond these stakes.

Where the plaintiff's claim exceeded 1500 feet in length on the ground the court properly limited their recovery to the legal length of the lode.

Department 2. Appeal from Superior Court, Mariposa County. JOHN M. CORCORAN, Judge.

Action by Bernard Conway and John Zimmerman against Ed. L. Hart, for the possession of part of a quartz mining claim, and for an injunction. From a judgment for plaintiffs, defendant appeals. Affirmed.

REDDY, CAMPBELL & METSON and J. J. TRABUCRO, for appellant.

J. W. CONGDON and W. B. BOSLEY, for respondents.

McFARLAND, J. This is an action to recover possession of a part of a quartz mining claim called the "Belmont," together with damages for certain alleged trespasses committed thereon by the defendant, and to obtain an injunction to prevent the defendant from taking rock and gold from said claim, and from interfering with it in any way. The case was tried by the court without a jury. The court found all the material issues in favor of the plaintiffs, for whom judgment was rendered; and defendant appeals from the judgment, a bill of exceptions being a part of the record. The plaintiffs made a location of the Belmont mine on April 26, 1894. Their notice of location describes the mine as situated in Mariposa mining district, county of Mariposa, and state of California, one mile northeast of the Malone mine and

mill. It states that the plaintiffs "have this day located and claim fifteen hundred linear feet along the course of this lead, lode, or vein of mineral-bearing quartz, and three hundred feet in width on each side of the middle of said lead," etc., and further describes it as "commencing at a shaft on said vein or lode near the southerly bank of Bear creek, and running in a southerly direction on the course of the vein or lode, fifteen hundred feet, to a stake in a mound of rocks, with surface ground six hundred feet in width," and states that "the corners and side lines of said vein are marked by stakes in mounds of rock." The defendant claims a quartz mining claim called the "New Discovery" on the same lode, alleged by him to have been located on the 25th day of August, 1894. His notice of location describes his claim as commencing at a certain point on the lode, and running northerly 1,500 feet; and, as there is no question about the formal correctness of his location, it need not be further noticed. The New Discovery, however, overlaps the Belmont for a distance of several hundred feet; and the contest between the parties is as to this piece of the lode, which is claimed by both.

The cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain is that, other things being equal, the prior locator prevails. "*Qui prior est tempore potior est jure.*" Therefore, as the location of the plaintiffs was prior to that of the defendant, it must prevail, unless the location itself was fatally defective, or all rights under it were lost on account of subsequent occurrences. Defendant attacks the validity of plaintiffs' location mainly upon three grounds, to wit, that there was not sufficient evidence to warrant the court in finding (1) that the boundaries of the claim were sufficiently designated; (2) that a lode or vein had been discovered by the plaintiffs within the claim at the time the location was

made; and (3) that the ground located was vacant government land, subject to location.

1. No mining customs or rules obtaining in the Mariposa mining district were given in evidence, and the notice of location of each of the parties states upon its face that it is made "in compliance with the requirements of the Revised Statutes of the United States." Each of the notices was recorded, although that is not required by the United States statutes; but the notice of plaintiffs, as recorded, complies with the provision of the second sentence in section 2324 of the Revised Statutes of the United States, which requires that, where a record is actually made, there must be a reference to "some natural object or permanent monument as would identify the claim." The only contention of defendant on this point is, however, that the location of plaintiffs does not comply with the provision of the first sentence of said section 2324, to the effect that "the location must be distinctly marked on the ground so that its boundaries can be readily traced;" and the objection made by the defendant in this matter is that the plaintiffs in making this location did not put in new stakes to mark the boundaries, but referred to and used stakes which were standing on the ground, and which had been put in by them on a former occasion. It appears that the plaintiffs had located the claim now called the "Belmont" several years prior to April, 1894, and had placed stakes, with mounds of rock, etc., at each corner of the surface ground and at the centers of the end lines, and that when they concluded to make the second location, under which they now hold, they found those stakes intact, and adopted them, —their notice of location referring to these stakes; and defendant contends that the location was invalid because plaintiffs did not actually put up new stakes. This contention is not maintainable. These stakes so distinctly marked the location on the ground that its boundaries could be readily

traced, and this was all that the statute requires. As the stakes referred to already stood at the proper places, it would have been a useless work to have taken them out and put them in again, or to have replaced them with other stakes. The location was, in this respect, sufficient, under the principles stated in *North Noonday M. Co. v. Orient M. Co.*, 6 Sawy. 311, 11 Fed. 125; *Jupiter M. Co. v. Bodie M. Co.*, 7 Sawy. 96, 11 Fed. 666; *Seidler v. La Fave*, 5 N. M. 44, 20 Pac. 789, and cases there cited. In the last named case the notice of the location of the Miner's Dream, the claim in contest, stated that the claim "commences at the northeast corner of the Iron King mine, and extends along the eastern boundary of the Iron King claim, in a southwestern direction, to the southeastern corner of the Iron King mine;" thence, in various directions, to the point of beginning; and it was held sufficient, if there were in fact monuments at the northeast and southeast corners of the Iron King; and this was under a statute of New Mexico, which was much more stringent as to monuments than the United States statute.

2. We think that there was sufficient evidence to warrant the court in finding that the plaintiffs had discovered a lode before their location in 1894, although the plaintiffs, who seemed to have taken this fact for granted, could evidently have put the matter beyond a doubt by simply asking any one of their witnesses a direct question upon that subject. They, as before stated, had located this claim several years prior to 1894, and had done a good deal of work on it. They had sunk a shaft 25 or 30 feet deep, and had taken from it a considerable amount of quartz rock, which formed a dump. The witness Heiser, who had worked for plaintiff, testified that some years before the last location he found rich rock on the south end of the claim, and informed one of the respondents of this fact, and warned him that the claim was jumpable, and that he afterwards got rock both from the shaft and the dump to show an expert. The witness Moise, when testi-

fyng about measuring the claim, said: "I measured along the lode line about the middle of May. I measured from the center of the shaft in Bear creek twelve hundred feet along the course of the vein, so far as I could judge its course. As the ground is all capped, there is no rock in place at the surface. I took my directions for the course of the vein from a line drawn from the shaft through two or three prospect holes on the northern end of the claim, where the ledge is exposed." And, although this was after the location of 1894, still it has a bearing on the question, for the testimony is fairly susceptible of the meaning that the vein was exposed in the shaft which plaintiffs had sunk several years before their second location. The plaintiff Conway testified—indirectly, to be sure—to his knowledge of the vein at the time of the location, as appears from the following question and answer: "Q. What direction does the vein run upon which you posted this notice A. North and south." The defendant himself, when on the witness stand, testified as follows: "Some work had been done south of the shaft in Bear creek, in the direction of my tunnel, that I know of, in 1885 and '6. It was done almost on my line in the direction of my shaft from the tunnel—between—on the vein. I was there when the work was in progress in 1886. At that time Mr. Conway and Mr. Heiser were working there. That work was inside the boundaries of my claim, probably three hundred feet south of my north line. The rock was gold-bearing." Now, there is no doubt whatever that there actually is, and, of course, at the date of the location was, a gold-bearing lode there. The appellant so avers in his answer, and proves by his testimony. And, considering all the evidence, we cannot say that the court was not warranted in holding that the rock taken by respondents and placed on the dump was not mere float rock, but rock taken from the lode which all admit to be there, and that consequently respondents knew of the existence of the lode when their location in 1894 was made. The evidence

on the point was, of course, not very direct and explicit, but it was sufficient to sustain the finding.

3. There was sufficient evidence to justify the court in finding that the premises were vacant United States public land, subject to appropriation, at the time of respondents' location, although here, again, the plaintiffs evidently could have made the matter clear by asking a direct question on this subject. Very little evidence on that subject is required, as against a subsequent locator who asserts no title antedating his location. Appellant testified himself that at the time he made his location, which was only four months after that of respondents, the land was unoccupied by anybody, and was "vacant government land;" and the testimony of respondents shows that they had located and worked the mine several years before their location in 1894; that they had placed stakes around the claim, and had sunk a shaft and taken out rock; and that when they went back there in April, 1894, they found the stake, the shaft, and the claim in the same condition, substantially, in which they had left them; and there is no evidence or pretense that any person other than respondents and appellant ever occupied this land or set up any claim to it. This was sufficient to warrant the court in finding that the land was vacant. Certainly it cannot be said that the court should have found otherwise on this point.

In addition to the foregoing points, appellant contends that respondents cannot maintain this action because before its commencement they had conveyed whatever title they had to third parties, to-wit, William S. Zeller, W. H. Moise, and T. P. Bisland. The evidence on this point consists of three written instruments, one of which is a contract between the parties by which the respondents agree to sell to said Zeller and others certain properties, called the Conway and Zimmerman mining claims, for the sum of \$6,000, to be paid on or before the 7th day of April, 1898; another of which is a deed which on its face conveys said claims from respondents to said Zeller

and others; and the third being a deed which purports to convey the said claims from said Zeller and others to the respondents. The three instruments were all executed at the same time, and constitute parts of one transaction. The deed from the respondents to Zeller and others went into the possession of the latter, and the deed from Zeller and others to respondents was given to another party as an escrow, to be delivered to the respondents upon the failure of Zeller and others to comply with their part of the said contract. Appellant contends that the first named deed was actually delivered to Zeller and others, and passed to them absolutely the legal title. Respondents testified, however, that the giving of the deed into the possession of Zeller and others was not intended as an absolute delivery, so as to pass title; and we think the court was warranted in holding that the three instruments, construed together as forming one transaction, constituted nothing more than a contract to convey,—a mere option given Zeller and others to purchase the property within a stated time for a named amount. And this, we think, was a correct conclusion, regardless of the fact that the instruments in question do not mention the Belmont mine.

The points above noticed are in their nature highly technical, but appellant makes another contention which, if maintainable, would go somewhat to the merits. It appears that at one time the respondent Conway, after some conversation between him and the appellant about their conflicting interests, put three stakes across the Belmont location some considerable distance north of the line claimed by respondents as their southern line; and it is contended by appellant that respondents were estopped thereby from claiming any ground south of the line. We do not think, however, that this contention can be maintained. The other respondent, Zimmerman, Conway's co-tenant, never saw or heard of these stakes; and, while Conway's explanation of the reasons why he put them there is somewhat unsatisfactory, he himself shortly

afterwards repudiated them, and we do not think that the evidence shows the elements which constitute an estoppel. Moreover, appellant's answer shows that he claimed that the boundaries of the New Discovery extended to their original limits and far north of these stakes set up by Conway; and in his testimony he admits that he did not consider himself bound by those stakes as his northern boundary, but claimed to the limits of his original location.

The court found that 1,500 feet running southerly along the ledge from respondents' northern stake and shaft, as described in their notice of location, would end a short distance north of what respondents claim to be their southerly end line, and confined the claim of the respondents to the actual 1,500 feet; and in this we see no error. There are no other points in the case which we deem necessary to discuss.

It is proper to say that this is an ordinary mining suit, where the rights of the parties against each other are alone to be considered. It does not arise under Section 2326 of the United States Revised Statutes, out of an application in the United States land office by one of the parties to obtain a patent, and an adverse claim there filed by the other party, in which questions touching the right of a party as against the United States government may arise, and where the judgment should sometimes be against both parties to the contest. (See *Jackson v. Roby*, 109 U. S. 440.)

The judgment appealed from is affirmed.

GAROUTTE, J., VAN DYKE, J., HENSHAW, J., and HARRISON, J., concurred.

J. H. MALABY v. W. G. RICE ET AL.

(15 Colorado App. 364; 62 Pac. 228. Court of Appeals. September 10, 1900.)

Where a co-tenant has obtained a receiver's receipt in his own name to the exclusion of his co-tenants and in fraud of their rights, as they assert, they can bring their suit to have their interests declared without waiting for the issue of the patent.

Need not protest. Although a rule of the Land Office allows an ousted co-tenant to protest against the application, the Land Office could not assume the judicial function of deciding the controverted point of the validity of the forfeiture.

¹Need not adverse. Where a co-tenant forfeits the interests of his co-tenants for failure to pay their proportion of the cost of annual labor and then applies for patent they are not bound to adverse, but can assert their rights by suit in equity, attacking the alleged forfeiture.

Appeal from the District Court of El Paso County.

PRITCHARD & COLE, for appellant.

JOHN R. DIXON and G. C. WELLS, for appellees.

WILSON, J.

The purpose of this suit instituted by appellees was to secure a decree adjudging that the defendant was a trustee,

¹*Franklin M. Co. v. O'Brien*, 18 M. R. 331. *Cedar Canon Co. v. Yarwood*, 27 Wash. 271; 22 M. R. —.

A relocation and change of name to perfect title to a lode by some of the tenants in common enures to benefit all though name of one omitted and done without his knowledge. *Van Wagencn v. Carpenter*, 27 Colo. 445; 61 Pac. 698.

A tenant in common can not exclude a co-tenant by relocating and patenting and taking in of a third party in the claim does not defeat such co-tenant's interest. *Stevens v. Grand Central M. Co.* 133 Fed. 28.

holding in trust for them four undivided one-ninth parts of the Mallet lode mining claim in the Cripple Creek district, and that defendant be compelled to convey such interest to them. Defendant interposed a demurrer to the complaint, which was overruled. Thereupon, he stood upon the demurrer and a decree was entered in behalf of plaintiffs as prayed for. The substantial allegations of the complaint, admitted by the demurrer to be true, were that on January 26, 1895—less than two years before the commencement of this suit—the parties to the action and one Bruce, whose interest is not involved in this controversy, were the owners of the said lode mining claim, the plaintiffs owning four one-ninth parts thereof. That on said date, plaintiffs, together with Bruce, executed to defendant a bond and lease of the claim, by the terms of which defendant was to be let into the exclusive possession thereof for the purpose of working it on his own account, paying a certain royalty therefor to the other parties, and with privilege of purchasing the other parties' interest in the claim within a certain time, at a specified price. This bond and lease, which was set forth in full in the complaint, specifically required defendant to do a certain amount of work upon the claim during each year that he held possession thereunder. The complaint specifically alleged that this provision of the lease requiring certain work to be done each year was inserted by the agreement of all parties, for the purpose of preventing a forfeiture of the claim on account of the failure to comply with the United States law with reference to assessment work.

The complaint further alleged that whilst defendant was so holding possession under said lease, and before its expiration, in violation of his contract, he demanded that plaintiffs pay to him four-ninths of the cost of the assessment work upon the claim for 1896, under penalty of the forfeiture of their interest therein. That upon their failure to make such payment, defendant filed a pretended notice of such forfeit-

ure, with the intent to defraud plaintiffs out of their interest, and thereafter, claiming to be the sole owner of the claim, made application for patent in the United States land office, and through such fraudulent means procured from the land office a receiver's receipt for the purchase price of said claim.

The chief contention of defendant in his argument is that the United States land department alone had jurisdiction of the controversy, and that a court of equity should not, if at all, assume jurisdiction until a patent for the claim had been issued by that department. This claim is based upon an alleged rule of the general land office to the effect that, "One holding a present joint interest in a mineral location in an application for a patent, who is excluded from the application so that his interest would not be protected by the issue of patent thereon may protest against the issue of patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal."

Without attempting to discuss the extent, application or object of this rule, it is obvious that it does not, and could not, apply to the matter in controversy. Here the question presented was one solely for judicial determination, namely, whether or not the plaintiffs herein were holding a "present joint interest" in the location. If such a protest had been made and received by the land department, it would not have assumed judicial functions and undertaken to decide the controverted point, but would have referred the parties to the courts for redress. The plaintiffs had a clear right to commence this proceeding in court, because it was the court alone that could determine the matter. The suit was not an attack, either collateral or otherwise, upon the proceedings in the land office. Neither was the suit instituted prematurely. The parties were not compelled to wait until a final patent had been issued. The issuance of a patent was a matter solely between the government and the parties. The

issuance of the receiver's receipt was an acknowledgment, so far as all other parties save the government was concerned, that the government had parted with its interest in the land. After its issuance, the parties to whom the receipt ran were vested with a title which they could convey, subject to be defeated only by the government. *Struby Co. v. Davis*, 18 Colo. 93; *Godding v. Decker*, 3 Colo. App. 204.

If plaintiffs had been compelled to wait until the actual issuance of the patent before they were entitled to commence proceedings to assert their rights, defendant could in the mean time have conveyed the property, and the plaintiffs would have been without any chance of redress.

From the facts as alleged in the complaint,—and those alone are before us,—we see no question of waiver by or estoppel against the plaintiffs. If such existed, they should have been set up as matters of defense. The mere facts that plaintiffs had notice that defendant claimed a forfeiture of their interest by reason of nonpayment of their part for the assessment work, and did not attempt to assert any adverse claim in the land office would not create an estoppel, nor would they thereby waive any rights. They, and parties similarly situated, might be, and indeed generally are, anxious to see patent proceedings pushed as vigorously as possible and a patent secured as quickly as can be. They certainly do not thereby, however, waive any right to subsequently go into the courts and have the interests of the parties in the claim properly determined and adjudicated.

We think the judgment in this case was clearly correct, and it will be affirmed.

Affirmed.

HORACE S. NILES V. GEORGE KENNAN.

(27 Colorado 502; 62 Pac. 360. Supreme Court. September 17. 1900.)

Defective abstract. If the abstract filed by appellant does not fully present the case and the appellee fails to use his privilege of filing a supplemental abstract the Court will not go to the original transcript to find the facts of the case.

¹**Abandonment restores the ground to the public domain.**

²**Where a claimant abandons and allows a collusive relocation he cannot retract and assert the validity of his original location.**

Facts of the case. Defendant purchased a mining claim December 26, 1890, and shortly thereafter abandoned it because unable to do the assessment work. Defendant's son relocated the claim January 30, 1891, as an abandoned lode, giving the date of discovery as December 20, 1890, and then conveyed to defendant, who claimed solely under the relocation until after plaintiff had located an interfering lode. *Held*, that defendant could not recall his abandonment, and claim that the relocation was to protect his rights under the original claim.

Appeal from District Court, Boulder County.

Action by Horace S. Niles against George Kennan. From a judgment in favor of defendant, plaintiff appeals. Reversed.

S. T. HORN, for appellant.

GUY D. DUNCAN, for appellee.

CAMPBELL, C. J. This is a suit in support of an adverse claim to mining property situate in Boulder county. The appellant, who was plaintiff below, claims it as a part of, and included within the surface boundaries of, the Golden

¹*Harkrader v. Carroll*, 18 M. R. 474.

²See *McCann v. McMillan*, 21 M. R. 7; *Depuy v. Williams*, 5 M. R. 251.

Crown, and defendant as a part of the Yellow Pine Extension lode. Aside from the contention that the Crown was not part of the public domain, no question is raised by defendant that plaintiff fully complied with the provisions of the mining laws relative to mining locations; so that plaintiff is entitled to recover unless defendant has shown a better title to the property under a prior valid location, and this he has attempted to establish.

The abstract of record may not fully, as it does not very clearly, set forth the points relied upon for a reversal, as our rules provide. If it does, with substantial accuracy, reproduce the evidence as exhibited below, then we cannot permit the judgment to stand. Possibly the evidence, if set forth in detail, would relieve the mind of the uncertainty which its abridgement found in the abstract has produced; and, if so, it was the duty of counsel for appellee, by a further abstract, to present all the facts necessary to a full understanding of the merits of the cause. But we shall not resort to the transcript, and must decline to perform for counsel the work which should be done by him, and shall, as accords with our established practice, consider alone the abstract of record as prepared.

The Golden Crown mine was located July 7, 1891. In his answer defendant avers that his grantors located the Extension lode in March, 1881, and that ever since that time he and they have made compliance with the various provisions of the statute which are essential to keeping good a mining claim as against subsequent locators. The original locators of the Extension were Brown and Scott. They sold it to William Mitchell, and on December 26, 1890, defendant bought it of Mitchell, and shortly afterwards abandoned it because he could not perform within the year the necessary assessment work. Thereupon, on January 30, 1891, A. L. Kennan, his son, located the same property as an abandoned

lode, naming December 20, 1890, as date of discovery, and giving it the same name that the original locators of that property selected. Thereafter A. L. Kennan conveyed to the defendant, George Kennan, the Yellow Pine Extension lode as located by him.

It thus appears that there was an intention upon the part of the defendant to abandon what rights he may have acquired to this property by the Mitchell deed, and it was error for the district court to refuse the request of plaintiff, as asked, to direct the jury to that effect. There was not an attempt by defendant, as there was in the case of *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173, to relocate the property for the purpose of protecting his rights under the location of 1881; for, until after the rights of plaintiff attached, defendant relied solely upon the new location as made by A. L. Kennan. That being so, it cannot be held that the new location inured to the benefit of the original claim. The abandonment restored the ground to the public domain, and, after it became segregated by plaintiff, could not be reclaimed by defendant merely because, after plaintiff's rights attached, defendant learned, as he says, that he might have held the ground without abandoning and locating, through his son, the same lode as a new claim. It was then too late to recall the abandonment, and rely upon other rights that once may have existed. It is possible that defendant supposed he was bringing himself within the principle laid down in the *Johnson-Young* case, and that the case as made below was within it; but the evidence, as contained in the abstract, does not warrant that inference. It may further be observed that the pleadings did not justify any evidence respecting the location of the Extension lode made in 1891 by A. L. Kennan, but there seems to have been no objection of that kind made by plaintiff; but there is such an absence of any showing of a valid location by A. L. Kennan that nothing further

need be said about it. Such being our conclusion, it becomes unnecessary to consider the various other assignments of error argued by appellant.

In view of another trial, it is appropriate to say that that part of the charge of the court to the jury wherein they are told that discovery and location may be inferred from certain other facts therein stated is not applicable, certainly, to the location as made by A. L. Kennan in 1891; and even if the law be as declared in *Harris v. Smelting Co.*, 8 Fed. 863, or as in *Cheesman v. Hart*, 42 Fed. 98, from the opinion in which latter case this charge seems to have been copied (concerning which we express no opinion), we find no evidence in this (as there was in the *Cheesman*) case that calls for such an instruction.

As to the discovery of mineral under the Scott-Brown location of 1881, as well as the other steps necessary to be taken to perfect a location, we remark that the evidence is exceedingly indefinite and meagre, as possibly counsel for defendant and the court below were aware. Hence the unusual instruction as to the inference that might be drawn from certain other facts in evidence.

Notwithstanding these observations, we are strongly impressed with the equities of defendant, not only because of the apparent attempt of his grantors in good faith to segregate from the public domain a mineral claim, but because of the recognition by plaintiff in dealings between them that defendant's rights to the controverted strip of ground were superior to his. We have striven to affirm the judgment, but cannot, in the light of the record before us, arbitrarily or otherwise wrest from plaintiff property which belongs to him, unless defendant has shown, as he has not, superior rights, by compliance with the law under which only has he any right to the territory in dispute. Upon another trial these doubtful points may be so elucidated that justice will be done. Our references to the questions discussed but not decided, as

well as to those determined, are applicable only to the very facts as set forth in the abstract, and not as they may otherwise appear on a new trial.

For the error of the court on the question of abandonment, the judgment must be reversed and the cause remanded, with leave to defendant, if he be so advised, to amend his answer in order to present the claim based upon the location of 1891, and it is so ordered.

Reversed.

WILLIAM D. STROBEL ET AL. V. THE KERR SALT CO.

(164 New York 303; 58 N. E. 142. Court of Appeals. October 2, 1900.)

The doctrine that relaxes the ordinary rules governing the rights of riparian owners in favor of great industries engaged in the development of the natural resources of the country has never been adopted by the Court of Appeals of this state, and no public necessity exists therefor.

¹**Pollution of stream by salt works.** Where a salt manufacturer adjacent to a flowing stream draws water therefrom in such quantity as to diminish its flow, and in using it in his operations renders the rest of the stream so salty as to unfit it for use by lower riparian owners, such use of the stream is such an unreasonable one as entitles lower riparian owners to restrain it, since they are entitled to a fair participation in the use of such water, which cannot be abridged by the convenience or necessity of the business of an upper riparian owner.

Others doing same thing. In an action by lower riparian owners to restrain a salt manufacturer from polluting a flowing stream with salt, the fact that other manufacturers are doing the same as defendant cannot preclude relief.

²**Legitimate uses enumerated.** Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation

¹One who in boring for natural gas strikes salt water which destroys the fresh water wells owned by neighbor is liable, it being shown that the injury was readily preventable. *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143; 18 Atl. 1012.

Action against coke oven for noxious gases. *Robb v. Carnegie*, 145 Pa. 324; 22 Atl. 649.

Keeping nitro-glycerine in city may be enjoined by citizens, although the act amounts to a crime. *Peoples Gas Co. v. Tyner*, 17 M. R. 481.

Injunction against oil tank on account of smell. *Waters Co. v. Cook*, 6 Texas App. 573; 26 S. W. 96.

Injunction to prevent escape of gas. *State v. Ohio Co.* 150 Ind. 21; 49 N. E. 809.

Smelter held in damages for destruction of fruit crops. *Sterrett v. Northport Co.* 30 Wash. 164; 70 Pac. 266.

²Under powers to prohibit nuisance, a city can not inhibit a lime kiln. *State v. Mott*, 61 Md. 297; 48 Am. Rep. 105.

when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use.

Common interest of several plaintiffs. Lower riparian owners having land separate from that of each other, abutting on the same stream, may sue jointly to restrain the pollution of the stream, as they all have a common grievance for an injury of the same kind.

Power to withhold injunction till plaintiffs do equity. The court has power in a proper case to withhold its injunction against the salt works parties until the complaining party make reservoirs to store water when there is a surplus so as to prevent either side being completely in the power of the other.

Appeal from the Supreme Court, Appellate Division,
Fourth Department.

Action by William D. Strobel and others against the Kerr Salt Company. From a judgment of the appellate division (49 N. Y. Supp. 1144) affirming a judgment for defendant, plaintiffs appeal. Reversed.

Whether an oil or gas well is a nuisance depends upon its condition and surroundings. *McGregor v. Camden*, 20 M. R. 274.

Armstrong v. Auen, 17 M. R. 392.

Measure of damages for obstruction of stream by coal refuse, is prima facie the cost of removing the same. *Bachert v. Lehigh Co.* 208 Pa. 362; 57 Atl. 765.

Lessor of colliery is not liable for obstruction of stream by the lessees without his knowledge or consent. *Id.*

Effect of laches to bar injunctive relief against the nuisance of open roast copper ore fumes. Damages allowed and injunctive relief denied. Joinder of parties where plaintiffs numerous but only severally injured and the like where more than one concern contributes to the nuisance. *Madison v. Ducktown Sulphur Co.* — Tenn. —; 83 S. W. 658.

The voluntary abatement of a nuisance by the defendant before final judgment does not relieve him from liability for past damages. *McCarthy v. Gaston Ridge Co.* — Cal. —; 78 Pac. 7.

This action was commenced in 1892 by 14 plaintiffs, who own various mills on Oatka creek, a natural stream running through the counties of Wyoming, Genesee, and Monroe, against the defendant, a domestic corporation engaged in the manufacture of salt at a point on said creek above the mills of the plaintiffs, to restrain it from diverting or polluting the waters thereof. The action is for an injunction only, as the plaintiffs in their complaint expressly reserve "to themselves and each of them their several damages, * * * which they will seek to recover in several actions at law in due time to be prosecuted for that purpose." In its answer the defendant denied that it had diverted or polluted the water of the stream, except that, in carrying on the business of manufacturing salt upon its own premises, it had made a reasonable use of a small portion of said water, and alleged that such use was necessary and lawful.

Upon the trial, in 1893, it appeared that Oatka creek formerly contained pure water, which was valuable for various purposes, and especially for use in manufacturing. The plaintiffs and their predecessors in title have owned mills and manufactories situated upon said stream from $1\frac{1}{2}$ to 30 miles below the salt works of the defendant, and have operated them by the water thereof for many years, one at least since 1825. While they still depend mainly upon water power to run their machinery, some of them are now using steam to a certain extent. There is less water in the stream at present than there was a few years ago, and the plaintiffs attribute the deficiency mainly to the diversion of water by the salt works of the defendant and others, recently erected, while the defendant insists that it is owing to the clearing away of forests and the drainage of swamps. The evidence does not show any material change in the forests of the valley during the past 10 or 15 years, but it appears that streams in Western New York have generally lessened in size during the past 25 or 30 years.

Since 1886 the defendant has carried on the business of manufacturing salt at a point upon said stream above the mills of the plaintiffs. The watershed above its works comprises about 14 square miles, and that below about 140. Its plant consists of 250 acres of land lying upon the creek, with extensive buildings, machinery, and appliances for the manufacture of salt. It has sunk seven wells upon its premises, each about 2,000 feet deep, at the bottom of which rock salt is found in two beds, which vary in depth from 30 to 60 feet. The salt is not mined, but water is pumped from a reservoir fed by a race from Oatka creek, forced down one pipe to the bed of salt, where it speedily becomes saturated, and thence, in the form of brine, is forced by hydraulic pressure up another pipe into storage tanks upon the surface of the ground. It is then drawn by gravity through a system of pipes into shallow pans and grainers, which are widely spread over the land of the defendant, where it is evaporated by exposure to the air and by means of steam and artificial heat. The function of the water is to bring the salt to the surface in solution, where it is first purified by the use of lime, and then evaporated, leaving a residuum of salt suitable for domestic purposes. All the water that is forced down into the earth and up again must be turned into vapor before the solid salt can be extracted therefrom. The water taken by the defendant for this purpose, and for use in its boilers to run the necessary machinery, is about 20,000 cubic feet, or 150,000 gallons, a day, which is more than 104 gallons per minute, and is about 4 per cent. of the flow of the stream in low water at the mills of the plaintiffs nearest the defendant's works. The part totally consumed in the boilers is very slight, as the steam is condensed into water by artificial means, and used over again.

The leakage from the salt after it is removed from the evaporating pans falls upon the surface of the ground, and scales, which are a combination of lime and salt formed dur-

ing the process of manufacture, are thrown from the grainers and pans upon the land of the defendant, all of which is within the drainage area of the Oatka. Much of this refuse, mixed with ashes, was used to fill up low places about the buildings so as to protect them in high water.

The stream is small, but no complaint is made of any deficiency in the supply of water except during the dry season of the year, when the plaintiffs have less than they need to operate their mills, and less than they had before the erection of the defendant's works. The waters of the creek have become so salt as at times to be unfit for watering cattle as well as for many other uses, both domestic and mechanical. The effect has been to destroy the most of the fish and certain kinds of vegetation growing in the stream or upon the margin.

There are 12 other salt works, somewhat widely separated, situated upon said creek below those of the defendant, which are operated in the same way, and contribute their quota of diminution and pollution. The drainage from several villages also affects the purity of the water, especially when the stream is low. Salt is the leading industry of the Oatka valley, and only one company actually mines by means of shafts sunk to the beds of salt. The salt so mined is dark, impure, and unfit for ordinary uses, unless it is dissolved, purified, and the water evaporated. The amount made daily by the defendant is about 860 barrels of pure white merchantable salt, but the full capacity of its works is nearly 1,200 barrels. It furnishes employment to more than 100 men and women. The capacity of the other salt manufactories, not including the one which mines its salt in bulk, is about 9,800 barrels daily. It requires 13.35 cubic feet of brine, of the usual strength, or more than 100 gallons, to make a barrel of salt. The effect of taking 150,000 gallons of water from the stream without restoring any part of it, or making any allowance for evaporation, would deprive the plaintiffs of 3.8 horse

power during an entire day of 24 hours, or more than 9 horse power for a working day of 10 hours, assuming that the water when not in use is saved by means of dams. If the production by the other works involves a proportionate use of the water, the number of horse power taken away would be increased accordingly. Salt water rusts machinery, deranges the operation of boilers, and requires the frequent replacement of pipes, cocks, etc., although it is used generally in steam vessels on the high seas.

Upon the trial, which took place about seven years after the defendant had established its plant, the conflict in the testimony was mainly confined to the degree of diminution and pollution. The amount of diminution depends largely upon the alleged return of the water to the stream after it had been converted into vapor and allowed to escape in the air. The amount of pollution depends largely upon when the samples of water which were analyzed by chemists, were taken from the stream, as those taken in high water contained a small amount of salt when compared with those taken during low water.

The trial court found, among other facts, that "the configuration of the ground on either side of the stream is such that the water or vapor escaping from said boilers or grainers, as it condenses into water, naturally returns to the same stream; * * * that, in the process of manufacturing salt, some water containing salt in solution has flowed by such natural drainage from said works into said stream; that since the beginning of this action the defendant has constructed a trench between its works and the said stream, so located and constructed as to carry any water containing salt in solution that might escape by drainage from defendant's works into its said salt wells; that it has not been shown that defendant diverts the water of the stream, or that it makes any other use of it, except in the mining and manufacture of salt on its own lands, as hereinbefore set forth, or that it has caused or

permitted the escape of foreign substances into said stream, except by the natural drainage from its own lands as aforesaid. The use of the waters of said creek, made as aforesaid by the defendant, is a proper and necessary use of the same upon its said premises in the transaction of its said business, and is a reasonable use thereof, such as it was lawfully entitled to make, and not prejudicial to the rights of the plaintiffs."

It was found, as a conclusion of law, that the plaintiffs were not entitled to any part of the relief demanded in their complaint, which was dismissed upon the merits, with costs. Upon appeal to the appellate division, the judgment entered accordingly was affirmed without an opinion, except that one of the justices who dissented wrote elaborately in favor of reversal. Seven only of the plaintiffs have appealed to this court.

HENRY S. BACON, for appellants.

NORRIS MOREY, for respondent.

VANN, J. As the findings of the trial court are general and somewhat indefinite, construction is necessary by reading them in the light both of the uncontradicted evidence and of the evidence most favorable to the defendant. When, for instance, the learned trial judge found no diversion of the water and no use of it except in making salt upon the defendant's own lands, he did not find that there was no diversion or pollution, and, if he had, it would have been an error of law, because opposed to the uncontradicted evidence, and open to review by us because the affirmance was not unanimous. So, when he found that the use of the water by the defendant was proper, necessary, and reasonable, and such as it was lawfully entitled to make, and not prejudicial to the rights

of the plaintiffs, it was to some extent a conclusion of law, and, in so far as it was a finding of fact, so general as to require construction through the aid of other facts, either found or uncontradicted. The same is true of the finding that the defendant has not unlawfully diverted or polluted the waters of said stream to the injury or prejudice of the plaintiffs; for as there was manifestly some diversion and some pollution, with some injury and some prejudice, the finding is either against the uncontradicted evidence, or simply reflects the opinion of the trial judge that the degree of diminution, pollution, and injury was not so substantial as to require action by a court of equity. While the trial judge found that, owing to the hills bounding the valley, the vapor caused by evaporating salt on so large a scale, "as it condenses into water, naturally returns to said stream," he did not and could not find that it all so returned, or state the proportion that escaped. It was impossible for any witness to testify what part of the vapor rising in a narrow valley about two miles wide from summit to summit, with comparatively low hills on either side, was carried away and dissipated by the wind, and what part returned to the earth, within the limits of the valley, in the form of mist or rain. The witnesses could not tell from observation, nor state as a fact, where such an invisible, elastic, and elusive substance went. There was no evidence of an increase in the rain or moisture. In cold weather, when the water is high, condensation would be rapid, but in warm weather, when the water is scarce, condensation would be slow. Some of the settling tanks are on the hillside, half a mile from the stream. The measurements made below the works included the return by condensation, and there was no evidence to justify the conclusion that all the water diverted reached the stream again. *Hudson v. Railroad Co.*, 145 N. Y. 408, 412, 40 N. E. 8. The counsel for the defendant states in his points that "it is a very moderate estimate to say that at least two-thirds of the es-

caping steam, on the average must be condensed and returned to the water supply of Oatka creek."

The theory upon which the trial judge proceeded to judgment is illustrated in his opinion, where he says: "The question is whether it is a reasonable use of the stream to allow the water impregnated with salt to take its natural course into the stream, impairing its use for drinking purposes, or otherwise affecting its use by the lower proprietors, to their injury." Discussing the question, he further said: "Since the salt is a component part of the soil itself, and the owner has a legal right to excavate it and place it upon the surface, it would be an unwarrantable stretch of the powers of a court of equity to compel its removal, merely upon the ground that the surface water, becoming impregnated with the salt, and taking its natural course into a stream, renders its waters unsuitable for drinking purposes, or causes injury to the boilers and machinery of a mill situated far down on the banks of the stream. * * * The defendant, as a riparian owner, has a right to the natural and necessary drainage of any salt water which may escape from the salt works into the stream. The water used was returned to the stream in as clear and pure a condition as the nature of the operations upon the lands would permit. The only obligation resting upon the defendant is to exercise ordinary care so as not to inflict unnecessary injury to the lower proprietors."

Referring to the case of *Barnard v. Sherly*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, which followed the Sanderson case, hereinafter alluded to, he quoted with apparent approval the following therefrom: "Where a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result, notwithstanding such care in the

management of the work, must be borne without compensation. It is, then, a case in which the interest and convenience of the individual must give way to the general good."

Thus, the trial judge was of the opinion that the plaintiffs, although they and their predecessors had used the waters of the stream in their mills and on their farms for half a century, could not prevent the defendant, which long afterwards, and with knowledge of the facts, established its plant, from devoting the stream to a new and unusual use, diverting the water, and turning "a fresh-water stream into a salt-water stream." This would amount to a virtual confiscation of the property of small owners in the interest of a strong combination of capital.

The use made by the defendant of the water of the stream is new and peculiar, for it involves its utter destruction as water. Until it is turned into vapor it refuses to give up its salt, so that it must cease to be water or fail to accomplish the defendant's purpose. That purpose is to utilize only by destroying, not in a scientific sense, of course, but in a practical sense. The loss is not incidental, by diminution through the process of using the water, as in most cases presented to the courts, but is absolute, by means of dissipation through the atmosphere. The diversion is as complete as if the water had been pumped over the hills bordering the Oatka valley and turned into another creek; for diversion, as applied to water courses, means taking water from a stream and not returning it so that the lower riparian owner can use it. *Parker v. Griswold*, 17 Conn. 288, 289. By taking nearly 150 gallons every minute during the working day of 10 hours, the defendant diverted that quantity of water from its natural course. The evidence, practically undisputed, shows that the water of the stream, which was fresh before the erection of the defendant's works, is now salt, especially in a dry time. The witnesses who tested it agree that it "tastes salt," and the effect of salt in the water was obvious to the senses in

various ways, as by small stalactites of salt formed at leaky spots in the pipes of machinery, the formation of visible crystals on stones in the stream, the rusting of machinery, the foaming of water in the boilers, and the destruction of vegetation. The owners of portable steam engines, who formerly used the water in their boilers, abandoned it and resorted to rain or well water. Wells near the stream were affected to some extent. In some places the salt killed vegetation, including willow trees. It destroyed fish in large numbers. Cattle and horses refused to drink the water, although some drank it when they had nothing else to drink. One of the plaintiffs boiled three quarts of water taken from the race leading to his mill, and obtained nearly a tablespoonful of salt. Another could grind only about half as much grain as he had previously ground at the same season of the year.

All this evidence, and other of like character, stands substantially uncontradicted, as it is not a contradiction for a witness to say that he did not observe these effects, when he did not examine in order to see what the facts were. The only dispute was in relation to the degree of pollution, and the defendant's evidence is substantially adopted for the purpose of this review. One of its experts, who for 20 years was the state chemist at the Onondaga Salt Springs, testified that in a sample taken in December, 1892, above the works, he found in a gallon of water .086 grains of salt, while a specimen taken right below the works contained 305.01 grains. A specimen taken at the mill of the plaintiff Munger, which is a mile and one-half below the defendant's works, and is above all the other salt plants, afforded 99.08 grains; one from the mill of the plaintiff Martin, about two miles below, 75.69; another from Brown's pond, still further down the stream, 82.14. These samples were taken by the chemist himself, and, except that last mentioned, were unaffected by any other source of pollution than the defendant's works. Thirty-three other specimens, obtained in April, 1893, still

further down the stream, after many small rivulets, as well as the drainage from other salt works, had emptied in, but not taken by the chemist himself, showed much less salt to the gallon, and averaged between 30 and 40 grains, only two of them exceeding 50. An analysis made by the plaintiffs' chemist of 44 specimens taken by a hydraulic engineer in September, October, and November, 1892, at points from one-half to one mile apart, all along the stream below defendant's works, showed a much larger proportion of salt, averaging, even after rejecting 11 of the highest, which went up into the thousands, from 100 to 300 grains to the gallon. The samples of the plaintiffs were taken from the stream after the commencement of the action and before the trial, while the defendant's were taken shortly before or during the trial, and after the changes had been made in order to prevent the salt water from reaching the creek. While all water contains some salt, that which contains less than 50 grains to the gallon is, according to the testimony of defendant's expert, suitable for use in steam boilers. Brine of full strength contains 18,072 grains to the gallon.

The testimony as to the amount of diminution is less definite and satisfactory than that relating to pollution, owing to the difficulty of measuring water flowing in a stream. It is undisputed, however, that the water diverted, as measured by defendant's expert, by "four independent but simultaneous methods," including "weir measurement," which embraced all water returned to the stream, if used by the plaintiffs to the best possible advantage, would be equal to nine horse power daily. One year it amounted to 4 per cent. of the flow at plaintiff Munger's mill during the whole month of July. The uncontradicted evidence and the evidence most favorable to the defendant shows such a degree of pollution and such an amount of diminution as to make it certain, in our judgment, that the trial judge, in his findings, meant that neither was in excess of what the defendant had a lawful right to put in

or take out of the stream, in conducting a lawful business upon its own premises. This theory is confirmed by his opinion, as he relies largely upon a case in Pennsylvania which held that one operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water that percolates into his mine into a stream which forms the natural drainage basin in which the mine is situate, although the quantity of water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453. That case had a varied history, and it was not until it came before the court for the fourth time that, influenced by the necessities of a great industry, the rule was laid down as stated. The case was first considered in 1878, when the claim of the lower riparian owner was sustained upon the principle of "*Sic utere tuo ut alienum non lædas*." In reply to the argument of counsel that "the law must be adjusted to our great industrial interests," the court said: "In the argument here the ground was distinctly taken that immense public and private interests demand that the right which the defendants exercised in ejecting the water from their mine should have recognition and be established. It was said that in more than a thousand collieries in the anthracite regions of the state the mining of coal can only be carried on by pumping out the percolating water which accumulates in every tunnel, slope, and shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run. * * * The conse-

quences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time when, under the operations of even a single colliery, a whole countryside would be depopulated." In 1880 the case was reviewed a second time, and it was again urged that the rights of the riparian owners should yield to the immense public interest involved. The court, however, reaffirmed its former decision, and, among other things, said: "The mining operations of the defendant do not involve the public welfare, but are conducted solely for the purposes of private gain. Incidentally all lawful industries result in the general good. They are, however, not the less instituted and conducted for private gain, and are used and enjoyed as private rights over which the public has no control. It follows that none of them, however important, can justly claim the right to take and use the property of the citizen without compensation." *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302, 307. In 1883 the court heard the case for the third time, with the same result; but on the last review, in 1886, by a vote of four to three, it reversed its previous decisions, and held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." The extensive coal mines of the state of

Pennsylvania were regarded of sufficient importance to warrant the court in departing from the law as previously laid down by itself in the same case, as well as from the rule which prevails in England and in this country, except in some of the states where mining is extensively carried on, and there is no way to get rid of the water in the mines except by pumping it into the streams. *Clifton Iron Co. v. Dye*, 87 Ala. 470, 6 South. 192. Courts of the highest standing have refused to follow the *Sanderson case*. *Columbus Iron Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630; *Beach v. Zinc Co.*, 54 N. J. Eq. 65, 33 Atl. 286; *Young v. District Co.*, L. R. (1893) App. Cas. 691. And its doctrine was finally limited by the court which announced it. *Robb v. Carnegie*, 145 Pa. St. 338, 22 Atl. 649. The court below, however, manifestly followed the Pennsylvania rule, without limitation. *Mann v. Mining Co.*, 63 N. Y. Supp. 752. We have never adopted that rule in this state, and no public necessity exists therefor, even if it would ever warrant the courts in relaxing rules for the protection of property of small value in the interest of some business required to develop the resources of the state, and in which much capital had embarked, giving employment to a great number of people.

There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the

right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must therefore be consistent with the rights of the others, and the maxim of "*Sic utere tuo*" observed by all. The rule of the ancient common law is still in force: "*Aqua currit et debet currere ut currere solebat.*" Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation, when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use, in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water. *Clinton v. Myers*, 46 N. Y. 511; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293, 30 N. E. 841; *Smith v. City of Brooklyn*, 160 N. Y. 357, 54 N. E. 787; *Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. Manufacturing Co.*, 77 N. Y. 525; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Crocker v. Bragg*, 10 Wend. 260; *Arnold v. Foot*, 12 Wend. 330; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Columbus Coal Co. v. Tucker*, 48 Ohio 41, 26 N. E. 630; *Beach v. Zinc Co.*, 54 N. J. Eq. 65, 33 Atl. 286; *St. Helen Sm. Co. v. Tipping*, 11 H.

L. Cas. 642; *Crossley v. Lightowler*, L. R. 3 Eq. 279, 2 Ch. App. 478; *Pennington v. Coal Co.*, 5 Ch. Div. 769; *Attorney General v. Lunatic Asylum*, 4 Ch. App. 146; *Hodgkinson v. Ennor*, 4 Best & S. 229; 3 Kent, Comm. 439; Gould, Waters, § 219; Higgins, Water Courses, 132; Washb. Easem. (4th Ed.) 215; 1 Wood, Nuis. §§ 364, 427.

The question of reasonable use is generally a question of fact, but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use, is a question of law. When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt, at times, that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted, such use, as a matter of law, is unreasonable and entitles the lower riparian owner to relief. Where the natural and necessary result of the place selected, and the method adopted by an upper riparian owner in the conduct of his business, is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain, on account of the inadequacy of the remedy at law, and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water, and their rights cannot be cut down by the convenience or necessity of the defendant's business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." *Wheatley v. Chrisman*, 24 Pa. St. 298. While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They

will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor; and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use.

The fact that other salt manufacturers are doing the same thing as the defendant, instead of preventing relief, may require it. "Where there is a large number of persons mining on a small stream, if each should deteriorate the water a little, although the injury from the act of one might be small, the combined result of the acts of all might render the water utterly unfit for further use; and, if each could successfully defend an action on the ground that his act alone did not materially affect the water, the prior appropriator might be deprived of its use, and at the same time be without a remedy." *Hill v. Smith*, 32 Cal. 166; *Woodyear v. Schaefer*, 40 Am. Rep. 419; *Sherman v. Iron Works Co.*, 87 Mass. 213; *Mayor, etc., of Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Crossley v. Lightowler*, L. R. 3 Eq. 279, 2 Ch. App. 478; *Pennington v. Coal Co.*, 5 Ch. Div. 769, 772. In *Garwood v. Railroad Co.*, 116 N. Y. 649, 22 N. E. 396, the diversion, as shown by the record on file in this court, was less than that testified to by the defendant's witnesses in the case before us. Even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction. *Knitting Co. v. Dean*, 162 N. Y. 278, 280, 56 N. E. 757.

The objection that the plaintiffs have no cause of action

common to all, and hence that they cannot sue jointly is unsound. While each owns a distinct piece of land, situated upon a part of the stream separate from that abutted upon by the land of every other owner, they all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest, and warrants a common remedy. *Emery v. Erskine*, 66 Barb. 9, 14; *Reid v. Gifford*, Hopk. Ch. 416, 477; *Murray v. Hay*, 1 Barb. Ch. 59, 62; *Blunt v. Hay*, 4 Sandf. Ch. 362.

It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can; for a court of equity, with its plastic powers, can require, as a condition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.

The judgment of the court below should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and O'BRIEN, BARTLETT, LANDON, CULLEN, and WERNER, JJ., concur.

Judgment reversed, etc.

ST. LOUIS MINING & MILLING CO. OF MONTANA v. MONTANA
MINING CO., LIMITED.

(104 Federal 664; Circuit Court of Appeals, Ninth Circuit. October
8, 1900.)

¹Same end lines for all veins. Where the end lines of a mining claim have been established, they remain the end lines as to all veins found within its surface boundaries.

²Wide apex covered longitudinally by two patents. When a secondary or accidental vein crosses a common side line between two mining claims at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, inasmuch as neither statute nor authority permits a division of the crossing part of the vein the rights of the parties will be determined by the priority of location, and the entire vein considered as apexing upon the senior location until it has wholly passed beyond its side line, without regard to the direction in which the vein dips.

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Montana.

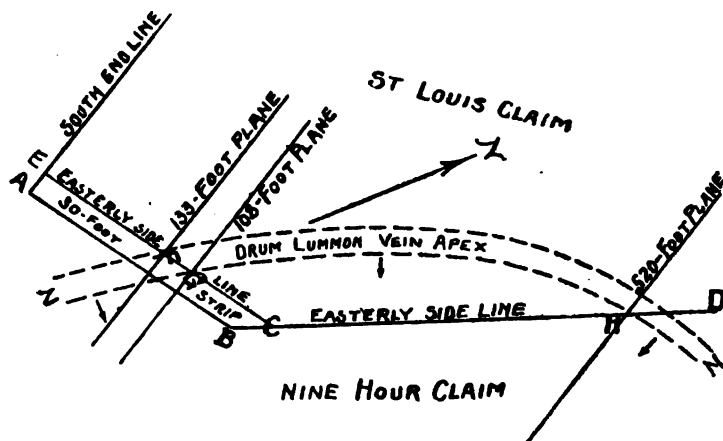
This is an action originally brought by the St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass, and the value of certain ores alleged to have been wrongfully appropriated and taken by the Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting in a verdict for the plaintiff in error in the sum of \$23,209, plaintiff in error now brings the suit to this court upon certain assignments of error, which, it alleges, deprived it of a larger verdict. There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis mining claim, situated near

¹The end-lines of the location are the end-lines for all the veins covered by the patent. *Walrath v. Champion Co.* 19 M. R. 410.

²*Empire Co. v. Bunker Hill Co.* 114 Fed. 417; 22 M. R. —.

A discovery shaft on the edge of a lode, part of the vein being covered by a patent, held valid. *Larkin v. Upton*, 17 M. R. 465.

Marysville, in the state of Montana; and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the Discovery vein and the Drum Lummon vein. The accompanying map gives the general location of the two claims, and all details of description which need be considered in this opinion:



By way of explanation of the map, it may be stated that the line, E, C, D, is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim, and 133 feet southerly from the point, C, on the line, C, E. The line marked "108-foot plane" is a similar plane 108 feet from the said point, C, and the line marked "520-foot plane" is a similar plane 520 feet southerly from the north-easterly corner of the St. Louis claim on the line, D, C. The strip of land included within A, B, C, E, is a strip 30 feet wide, called in the record the 30-foot or compromise strip. The arrows show the direction of the dip of the vein to be eastwardly, and underneath the Nine Hour claim. The Discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a discrepancy between the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point, H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the north, and that the foot wall does not pass out of the St. Louis claim until a con-

siderable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts. Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into, by which the owners of the St. Louis claim agreed to convey to the owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip; and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim, and further charged the jury that the line, E, C, was a side line common to the two claims, and that, so long as the Drum Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of \$23,209. A writ of error was sued out by the defendant in error to this court, and this court in *Montana M. Co. v. St. Louis M. & M. Co.* 102 Fed. 430, sustained the lower court upon these propositions as submitted to the jury, holding the line, E, C, D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion the 30-foot strip will not be treated separately, but will be regarded as part and parcel of the Nine Hour claim. Upon the trial, however, the plaintiff in error further offered

evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made—First, as to the portion of the vein between said planes underneath the 30-foot strip; and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip. But, for the purpose of applying the principles of law which will control here, these two offers may be considered as one in accordance with the decision in 102 Fed. 430, *supra*. The court sustained objections to the evidence offered, and, upon assignments of error based upon these rulings, the case is now before this court.

ARTHUR BROWN, H. P. HENDERSON, E. W. TOOLE, and
T. C. BACH, for plaintiff in error.

W. E. CULLEN, E. C. DAY, and W. E. CULLEN, JR., for
defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error raise but one question which need now be passed upon, all others having been adjudicated, upon the writ of error of the defendant in error herein, in the case of *Montana M. Co. v. St. Louis M. & M. Co.*, 102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But, while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question. Two important elements enter into the consideration of mining rights: First, the surface boundaries, defining the rights acquired by reason of a vein or

veins apexing within such boundaries; and, second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line, E, C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line, E, C, is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. *Iron Silver M. Co. v. Elgin M. & S. Co.*, 118 U. S. 196, 207; *Walrath v. Champion M. Co.*, 171 U. S. 293, 307. This court has already determined that the line, E, C, D, is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides:

"The locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part thereof," and that, under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between

the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim. For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line, and 25 feet in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitably be cut by a plane parallel with and midway between the 108 and 133-foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the senior locator (*Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478, 484), the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule, and its application to the case before the court, should be the same whether the vein dips towards the junior location or towards the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit

only remains so long as the entire vein is within the claim, cites the case of *Fitzgerald v. Clark*. 17 Mont. 100, 42 Pac. 273, the decision in which was affirmed by the supreme court of the United States. 171 U. S. 92. But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply. If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex, or in this case the footwall. It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed, which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and

133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.

Ross, Circuit Judge. I dissent. The case of *Montana M. Co. v. St. Louis M. Co.*, 102 Fed. 430, referred to in the foregoing opinion, affirmed the existence of extralateral rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. 102 Fed. 430. The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should be granted, and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line, only, be discussed by counsel, and fully considered by the court, before final determination.

NORTH AMERICAN EXPLORATION CO., LIMITED, ET AL. v.
ADAMS ET AL.

(104 Federal 404. Circuit Court of Appeals, Eighth Circuit. Oct. 15, 1900.)

Water right may be abandoned. The abandonment of the right to divert and use the waters of a stream is not different in its character from the renunciation of any other right which is asserted and maintained by its use.

Abandonment is either express or implied. It may be effected by a plain declaration of an intention to abandon. It may be inferred from acts or failures to act so inconsistent with an intention to retain and assert the right that the unprejudiced mind is convinced of the renunciation.

Where the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively correct, and will not be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence.

Conveyance of mill site carries water right. A deed of a mill site, without specific mention of a right to divert water from a stream and to use it to operate a mill which has been used thereon, conveys the water right as an appurtenance to the mill site, in the absence of any reservation of it, of any conveyance of it to another, or any other evidence that the grantor did not intend to part with it.

A water right used upon a mill site to treat ore extracted from a mining claim, and brought to the mill site for treatment, is not appurtenant to the mining claim, but to the mill site.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

CHARLES J. HUGHES, JR., for appellants.

The word appurtenances may carry a water right. *Gelwicks v. Todd*, 24 Colo. 494; 52 Pac. 788.

The right to dump is appurtenant to deed conveying a tunnel. *Scheel v. Alhambra Co.* 18 M. R. 616.

The question of whether a ditch is an appurtenance to the land

H. M. Hogg, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This appeal challenges a decree of the circuit court which perpetually enjoins the North American Exploration Company, Limited, Ernest Thalman, and Hamilton F. Kean, the appellants, from diverting the waters of Bear creek so as to prevent the same from flowing freely to the extent necessary, not exceeding 180 miner's inches, for the lawful uses and purposes of the appellees, Alva Adams, Frank Adams, W. H. Trout, and George Holmes co-partners doing business as the Chief Mining & Milling Company, in carrying on upon their mill site their concentrating plant and mill for the reduction of ores and for the operation of their mines. The appellants allege that this decree is erroneous for three reasons: (1) Because, while they concede that the grantors of the appellees first diverted and appropriated the water of this creek to a beneficial use in 1886, and thereby obtained the right to so divert and use it, yet they assert that this right had been abandoned and lost by these grantors and their successors in interest when, in 1898 the appellants diverted and used this water, and thereby acquired the superior right to it; (2) because the conveyances of the Silver Chief mill site, to which the water was diverted and on which it was used in 1886, to the appellees, did not, in terms, convey the right to divert and use the water as an appurtenant to the mill site; and (3) because neither the appellees nor their grantors ever used 180 miner's inches of water, or more than 15 miner's inches. These objections to

will not be considered in a suit to foreclose mortgage. *Bass v. Buker*, 6 Mont. 442; 12 Pac. 922.

A water right is appurtenant to the land upon which it is used. *Leggat v. Carroll*, — Mont. —; 76 Pac. 806.

the decree will be considered in the order in which they have been stated.

The abandonment of the right to divert and use the waters of a stream is not different in its nature or character from the renunciation of any other right which is asserted and maintained by its use. It may be express or implied. It may be effected by a plain declaration of an intention to abandon it, and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation. In the case in hand there was no express declaration of a surrender of the right which the grantors of the appellees acquired in 1886, and the issue of abandonment resolved itself into a question of fact, to be determined by the course of action which the parties pursued and the circumstances surrounding them as they were developed in the evidence. The facts material to this question which the evidence established were these: The waters of Bear creek, at the place where this controversy arose, run in a northerly direction. On its easterly side lie the Silver Chief mining claim and the Silver Chief mill site, which are owned by the appellees, with the exception of one acre of the mill site, upon which the mill was not situated, and to which no water was ever diverted. This acre is owned by two of the appellants. On the west side of the creek are the Nellie mining claim and the Nellie mill site, which are owned by the appellants. In 1886 and 1887 all these claims and mill sites were in the possession of the same claimants who built a mill on the Silver Chief mill site, and used it to reduce ore which they took from the Nellie mining claim, and brought to the mill on a tramway. For the purpose of operating this mill, they diverted the waters from Bear creek by means of a ditch and a pipe line, conducted it to the Silver Chief mill site, and there used it in their mill for the purpose of milling ore and producing power. It was conceded at the hearing and upon this argument that these acts gave to the

owners of this property an established right in 1886 and 1887 to perpetually divert and use the waters of this creek to the extent and for the purposes for which they were used in the years 1886 and 1887. The operation of the mill proved to be unprofitable, and it was not continued. After its operation ceased the owners loaned the wheel and sold the pipe which was used to conduct the water to the mill, and in the year 1897 a snow-slide swept the mill away. During these years from 1886 to 1897 the waters of the creek do not seem to have been claimed or used by others, and there was testimony that in the years 1896 and 1897 the owners of the Silver Chief mill site turned the waters of the creek into their ditch, although it does not appear that they used it for any beneficial purpose. In September, 1896, the appellees filed a notice of their claim to the right to divert and use the water of Bear Creek through the old ditch, under the statute. In May, 1898, the appellees commenced to construct a mill on the site of the old mill upon the Silver Chief mill site, to clear out their ditch; and to build a pipe line to conduct the water over its old course to their mill site, and in the year 1898 they had completed their mill, and commenced to use the water through this ditch and pipe line to operate it.

The appellants' claim to a superior right to this water rests upon these facts: On August 28, 1896, their grantor located a ditch and water right to divert 500 miner's inches of the waters of this creek at a point above the point of diversion of the appellees, and constructed a ditch 200 feet long, and led a portion of the water of the creek into this ditch, but did not apply it to any beneficial use. In April, 1898, the appellants commenced to dig a ditch from this point of diversion, to lay a pipe line to the Nellie mill site, and to construct a power house thereon to generate electricity to light the Nellie mine. They constructed their power house, and first actually applied the waters of the creek to a beneficial use about three months after the appellees, in July, 1898, used it to operate

their mill. The uncontradicted testimony of the witnesses was that the right to divert and use water upon a mill site was of very great value, while a mill site without the right to divert and use water upon it was practically valueless. The successive owners of the Silver Chief mill site testified that they never had any intention of abandoning the water right which they acquired in 1886.

There may be grave doubt whether or not the appellants could maintain a superior right to the diversion of the waters of this creek, even if it should be held that the appellees or their grantors had abandoned the right which they acquired in 1886. The ditch which the grantor of the appellants dug, and the diversion which he made of the waters of this creek in 1896, was on the east side of the stream, and he did not apply these waters to any useful purpose. Before the appellants commenced to construct the ditch and pipe line which they are now using, the appellees had filed a notice of their claim in September, 1896. Before the appellants had actually used any of the waters for any beneficial purpose, the appellees had constructed their new mill, had led the waters of the creek through the old ditch to their mill site, and had been using it for three months for the purpose of operating their mill. Upon this state of facts the equity of the appellants is not very persuasive. But before they can reach a consideration of these questions they must bear the burden of clearly establishing that the appellees or their grantors abandoned the right which they acquired in 1886 to divert the waters of this creek and use them upon their mill site. It may be conceded that the evidence in this case is so evenly balanced that a finding of abandonment would not be disturbed. The long period of 11 years during which the right to this water was not used, the loaning of the mill wheel, the sale of the pipe in the pipe line, the silence and inaction of the appellees and their grantors, might warrant such a conclusion. But this record is far from barren of competent

and persuasive evidence which might well lead to an opposite finding. The facts that the Silver Chief mill site without the water right was valueless; that with it it was worth thousands of dollars; that during the time when this right was not exercised no one claimed to disturb or supersede it; that the old mill stood until swept away by the snow in 1897; that in the years 1896 and 1897 its owners turned the waters of the creek into the old ditch and permitted them to flow there; that they testify that they never intended to abandon their water right; and the very persuasive consideration that the voluntary renunciation of valuable rights of property is contrary to the ordinary course of human action,—furnish ample warrant for the conclusion that the right to divert and use this water acquired in 1886 never was abandoned, either by the appellees or by their predecessors in interest. This was the conclusion reached by the court below after a careful consideration of all this evidence. It is settled by the repeated decisions of the supreme court and of this court that where the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings should not be disturbed. *Mann v. Bank*, 86 Fed. 51, 53; *Tilghman v. Proctor*, 125 U. S. 136; *Kimberly v. Arms*, 129 U. S. 512; *Furrer v. Ferris*, 145 U. S. 132, 134; *Warren v. Burt*, 58 Fed. 101, 106; *Plow Co. v. Carson*, 72 Fed. 387, 388; *Trust Co. v. McClure*, 78 Fed. 209, 210. The evidence of abandonment is not so clear and convincing in this case as to warrant a reversal of the conclusion of the circuit court that it was not established.

The appellants derive their title to the Nellie mining claim, the Nellie mill site, and one of the five acres which constitute the Silver Chief mill site by various mesne con-

veyances from the same parties from whom the appellees derive their title to the Silver Chief mining claim, and all of the Silver Chief mill site except the acre owned by two of the appellants. The old mill built, in 1886, was on that portion of the Silver Chief mill site owned by the appellees. The new mill which has been constructed, and which is now operated by the appellees, is upon the site of the old one. The water right acquired in 1886 was used in the old mill in 1886 and 1887 to furnish power and to mill ore which had been extracted from the Nellie mining claim. This water right is not specifically mentioned or described in any of the conveyances, and counsel for the appellants argue that it was appurtenant to the Nellie mining claim, and passed to the appellants by the conveyance of that claim, and that, if it did not pass to them, it remained vested in the former owners. It is difficult to perceive how the right to divert, conduct to, and use water in a mill which is used to reduce ore is any more an appurtenance of the mine from which the ore is extracted than the right to divert and use it in a mill which is used to grind corn is appurtenant to the field where the corn grew. The position that this water right was appurtenant to or passed with the Nellie mining claim, because it was used to reduce ore extracted from it and treated in a mill on other property, finds no support in reason or authority. Turning to the other contention of counsel for appellant, it is conceded that a water right may be reserved from a conveyance of the mill or site on which it was exercised, and that it may be conveyed without or with the mill site. Whether or not it passes by a conveyance of the mill or mill site on which it was used depends upon the intention of the parties to the conveyance. In this case the old mill was standing when many of the conveyances of the mill site under which the appellees hold were made. The old ditch was there. The mill and site without the water right were worthless, while with

it they were of considerable value. The grantors in the various conveyances of the mill and its site did not reserve the water right which had been exercised upon them, nor have they ever conveyed it to others, claimed it themselves, or otherwise evidenced their intention that it should not pass by their deeds. The inference is irresistible that they intended to and did convey it as an appurtenance of the mill site.

A deed of a mill site and mill upon which a right to divert water from a stream and to use it to operate a mill has been exercised conveys the water right as an appurtenance to the mill, in the absence of any reservation of it, of any conveyance of it to another, and of any other evidence that the grantor did not intend to convey it.

The third objection to the decree is that it is too broad; that it permits the appellees to use 180 miner's inches of water per second, when neither they nor their grantors ever have used more than 15 miner's inches. There are two reasons why this objection is untenable. In the first place, there is evidence that the owners of the Silver Chief mill site used, in 1886, all the water that would discharge itself through an aperture 8 inches in diameter under a head of 165 feet to drive their mill wheel, and all that would discharge from an opening 2 inches in diameter under a pressure of 20 feet fall to mill their ore, and this was much more than 15 miner's inches per second. In the second place, if, as appellants claim, the appellees have not used, and cannot beneficially use, in the operation of their mill and mines, more than 15 miner's inches, then the decree allows them to use no more; for the injunction against the appellants only enjoins them from preventing the flow of such an amount of water to the appellants' mill, not exceeding 180 miner's inches, as is necessary to operate their concentrating plant, mill, and mines. The real issue tendered by the pleadings in this case was the priority of right to the use of the water of

this creek, and not the quantity which the appellants were entitled to use, and the testimony upon the latter question is not of that clear and convincing character which calls for a modification of the decree which the chancellor has rendered, and it is affirmed.

THE GLENGARY CONSOLIDATED MINING COMPANY ET AL. V.
BOEHMER ET AL.

(28 Colorado 1; 62 Pac. 839. Supreme Court. October 15, 1900.)

Holds title as trustee. The title to property belonging to a corporation is vested in it for the use and benefit of its stockholders and it holds the property as a trustee.

Combination attempting control. Ordinarily the majority of the stockholders of a corporation have the right to control its affairs, but this must be done through its proper representatives in the interest of all the stockholders. No combination of stockholders less than the whole will be permitted to control the affairs of the corporation in their interest alone to the injury of the minority.

Trustee becoming both vendor and vendee. Where the trustee without the full knowledge and consent of his *cestui que trust*, in dealing with the property assumes to act as both vendor and vendee, the *cestui que trust* may avoid the transaction at his election without regard to its fairness or unfairness.

Where one mining corporation gets control of the majority of the stock of another and thereby is enabled and does select a directory under its control through which directory it secures a bond and lease on the property of the second company, such contract is void and will be set aside at the suit of the minority stockholders of the second company without regard to whether or not the controlling company was guilty of any actual fraud in securing the contract.

Corporate Entity. All the stock of a corporation was held by one person who also held the office of treasurer of the company. He worked and ran the mine in his individual name: *Held*, that the corporation was not liable for debts so incurred. *Albro M. Co. v. Chinn*, — Colo. App. — ; 77 Pac. 1097.

A charter is not assignable. *Welch v. Old Dominion Co.* 10 N. Y. Sup. 174.

A corporation is an "association of persons" entitled to enter coal lands. Patent cancelled where obtained by use of names of its employees. *U. S. v. Trinidad Co.* 137 U. S. 160.

Stock. Transfer of stock as gift to a company; held valid. *Wheeler v. Mineral Farm Co.* 31 Colo. 110; 71 Pac. 1101.

Company may purchase its own stock. Contract to rescind if stock buyer dissatisfied held valid. *Porter v. Plymouth Co.* 29 Mont. 347; 74 Pac. 938.

Appeal from District Court of Lake County.

The following summary of the findings of fact and conclusions deduced therefrom by the trial court fully present the only question necessary to consider on this appeal.

The Ibex and Glengary Consolidated Mining Companies are corporations organized under the laws of this state, and own adjoining mining properties. The former procured, by purchase, a majority of the capital stock of the latter. The object of the Ibex Company in securing this stock was, to enable it to select a directory of the Glengary Company which would be under its control, and which in fact, it did succeed in accomplishing. Its purpose in so doing was to secure a bond and lease on the property of the Glengary Company. It obtained a contract of this character through the directory

Rights of Stockholder. Demand on the corporation not always necessary condition precedent to suit on behalf of minority stockholders. *McConnel v. Combination Co.* — Mont. — ; 76 Pac. 194.

A stockholder can not sue for an accounting without previous demand on the company to bring the action or alleging facts that would show such demand useless; alleging that defendant directors "control" the company is not enough. *Bowne v. Smith*, 90 N. Y. S. 204.

Stockholders may maintain action to set aside collusive foreclosure of the mining property of the company. *Whitney v Hazard*, — S. Dak. — ; 101 N. W. 346.

Officers and Directors. A director performing duty of general manager under promise of compensation is entitled to recover for his services. An officer sued for an accounting is entitled to off set his salary. *Bevier v. Watson*, 107 Mo. App. 451; 80 S. W. 287.

A contract providing for the indefinite succession or election of the same directors is void. *Glass v. Basin Co.* — Mont. — ; 77 Pac. 302.

A director is not precluded from purchasing an outstanding bona fide debt against the company. *McIntyre v. Ajax Co.* — Utah — ; 77 Pac. 613.

The separate assent of a majority of the directors to the employment of a surgeon to attend to a person injured in the company's employ, binds the company without official corporate action. *Scott v. Superior Co.* 144 Cal. 140; 77 Pac. 817.

of this company elected at its instance, the proposition for which, as also its terms and conditions, came from the Ibex Company. To annul this transaction the appellees (stockholders of the Glengary Consolidated Mining Company), as plaintiffs, brought this action in the court below. From a judgment and decree in their favor, the defendants appeal.

CHAS. J. HUGHES, JR., and CHAS. CAVENDER, for appellants.

JOHN A. EWING and JOHN M. MAXWELL, for appellees.

MR. JUSTICE GABBERT delivered the opinion of the court.

Officers once elected continue indefinitely until successors appointed. *Lucky Queen Co. v. Abraham*, 26 Oreg. 282; 38 Pac. 65.

Bound by acts of officers who manage the property without regard to directors. *Bank v. G. V. B. M. Co.* 89 Fed. 439.

Authority of one director when entire management is committed to him by the rest. *Robinson Co. v. Johnson*, 10 Colo. App. 135; 50 Pac. 215.

Attempted action against directors for failure to make success of a company formed by them to develop mines of the plaintiff. *Cates v. Sparkman*, 73 Tex. 619; 11 S. W. 846.

No defense to president's salary that he did not, as he promised, make the mine a success. *Paducah Co. v. Hayes*, 15 Ky. L. R., 517; 24 S. W. 237.

Corporate Leases and Conveyances. A corporation may sell its entire property notwithstanding dissent of a single stockholder. Where its charter gives it such power it has the right to sell for stock in another corporation. *Traer v. Lucas Co.* 124 Ia. 107; 99 N. W. 290.

A mining company may lease its lands purchased for mining purposes though it is thereby prevented from further carrying out its purported object of existence. *Stark v. Guffey Co.* — Tex. — ; 80 S. W. 1080.

Stockholders can not set aside a conveyance executed by their corporation. *Hearst v. Putnam*, — Utah — ; 77 Pac. 753.

A previous assent is equivalent to a subsequent ratification under the act forbidding sale of mining ground by a corporation without the ratification of two-thirds of the stockholders. *Lacy v. Gunn*, 144 Cal. 511; 78 Pac. 30.

The title to the property belonging to a corporation is vested in it. This it holds subject to charter and its by-laws, for the use and benefit of its stockholders, and it therefore falls within the strict definition of a trustee, *i. e.*, "one who holds the legal title for the use and benefit of others." *Miner v. Belle Isle Ice Co.*, 53 N. W. 218; *Peabody v. Flint*, 6 Allen 52.

Ordinarily, the majority of the stockholders of a corporation have the right to control its affairs, but this right is limited to the legitimate exercise of the corporate powers. Among these is the management of the affairs of the corporation through its proper representatives and officials, in the

Conveyance of entire property to another corporation—deed held void. *Summers v. Glenwood Co.* 15 S. Dak. 20; 86 N. W. 749.

President and secretary cannot without action of the board appoint agent to sell its property. *Johnson v. Sage*, 4 Ida. 758; 44 Pac. 641. Or grant a license to convert its products. *Henshaw v. People's Gas Co.* 132 Ind. 545; 32 N. E. 318.

Stockholders cannot dispose of corporate property. *Rough v. Breitung*, 117 Mich 48; 75 N. W. 147.

Corporate Minutes. The circumstances may show delivery of corporate deed without proof of express authority on the minutes of the company. *Rubie Co. v. Princess Co.* 31 Colo. 158; 71 Pac. 1121.

Where loosely conducted without meetings, etc., strict rules will not be enforced in its favor. *G. V. B. Co. v. Bank*, 20 M. R. 66.

Rights of stockholders where there is no known board of directors and organization has not been kept up. *Tennessee Co. v. Ayres*, (Tenn.) 43 S. W. 744.

By-Laws. By-Laws cannot be changed at stockholders' meeting without notice of such proposed amendment. *Bagley v. Reno Oil Co.* 201 Pa. 78; 50 Atl. 760.

A by-law concerning the voting power of stock is binding in the selection of chairman the same as in subsequent voting. *Proctor Co. v. Finley*, 17 Ky. L. R. 310; 33 S. W. 188.

Process. A suit for damages is transitory and may be brought wherever defendant can be lawfully served; but a corporation cannot be brought into court by service on a process agent to answer for its defaults in another state. *Olson v. Buffalo Hump Co.* 130 Fed. 1017.

An agent of a corporation assigns his claim for wages to plaintiff

interest of all shareholders. *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

No combination of stockholders of a corporation less than the whole will be permitted to manage or control its affairs in their interest alone. Minority stockholders cannot be deprived of their rights by such a combination under the guise of a policy of the corporation dictated by the majority. So far as the rights of the minority are concerned, the majority, in furtherance of their plan to reap a benefit to themselves through a transaction in which the minority do not participate, become the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders.

who sues and serves his assignor as agent of the defendant company; the service is void. *White House Co. v. Powell*, 30 Colo. 397; 70 Pac. 679.

Seal. Scroll held good corporate seal. *G. V. B. Co. v. Bank*, 20 M. R. 66.

Corporation may adopt new seal when the president withholds the old one. *Socoro Co. v. Preston*, 40 N. Y. Sup. 1040.

Torts. Corporation held liable for tort committed after expiration of its charter. *Miller v. Newburg Co.* 31 W. Va. 836; 8 S. E. 600.

For culpable negligence a corporation may sue its own officers. For acts clearly in fraud of the minority stockholders a stockholder may sue. Essentials of bill against corporation stated. *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. R. 806.

Fraud. Resolution of company giving back pay to directors held void. *McConnell v. Combination Co.*, — Mont. — ; 76 Pac. 194.

A loan of money by the directors to the corporation is not void although made for the purpose of securing an ultimate foreclosure on the company's property securing the loan. *Schnittger v. Old Home Co.* 144 Cal. 603; 78 Pac. 9.

Controversy involving the point that a majority of the stockholders were using the corporate funds to develop the adjoining mine and not the mine of the company. *Scadden Flat Co. v. Scadden*, 121 Cal. 33; 53 Pac. 440.

Loan by president and directors at an excessive commission, concealing the fact that these officers personally advanced the money, held a breach of trust and rescindable as to the commission. *Bensiek v. Thomas*, 66 Fed. 104.

Ultra Vires. The transfer by the directors of all the property of a

Miner v. Belle Isle Co., supra; Ervin v. Oregon R. & N. Co., 27 Fed., 625; *Pearson v. Concord R. Co.*, 62 N. H. 537.

A trustee cannot deal with the trust estate in a matter where his interests would, or might, conflict with his duty to his *cestui que trust*. In all cases where, without the full knowledge and assent of the *cestui que trust*, he has assumed to act in the capacity of vendor and vendee, the *cestui que trust* may avoid the transaction at his election. No question of the fairness or unfairness of such a transaction can be considered under the state of facts existing in this case. This proposition is fully discussed in the case of *Morgan v. King*, 27 Colo. 539. Applying these principles to the facts found by the trial court, it is clear that its judgment was correct.

The Ibex Company controlled a majority of the stock of the Glengary Company. It secured such stock for the pur-

corporation to a foreign corporation to force the stockholders to accept stock of the new company, is not only voidable but void. Discussion of "void and voidable." *Forrester v. Boston Co.* 29 Mont. 397; 74 Pac. 1088.

Where money has been borrowed in excess of its authorized indebtedness, but the money has been used for the benefit of the company, the validity of the transaction cannot be attacked although the money was used for *ultra vires* purpose. *Traer v. Lucas Co.* 124 Ia. 107; 99 N. W. 290.

Corporation cannot plead *ultra vires* to its own fraud. *Zinc Co. v. Bank*, 103 Wis. 125; 79 N. W. 229.

A corporation may be held for a loan, though such loan forbidden by its by-laws. *Bensiek v. Thomas*, 66 Fed. 104.

Foreign Corporations. Failure to comply with statute does not make contract void or prevent defense of a suit. *Blodgett v. Lan- von Z. Co.* 120 Fed. 894.

That a foreign corporation keeps a transfer register in New York and has a bank account there with occasional meetings of directors in that state, does not constitute doing business in that state so as to be liable to service of process in New York. *Honeyman v. C. F. & I. Co.* 133 Fed. 96.

Burden of showing non-performance of statutory conditions imposed on foreign corporation is on the party alleging it. *Lehigh V. Co. v. Gilmore*, — Minn. —; 101 N. W. 796.

pose of controlling the Glengary Company in its interest. By assuming control of the Glengary Company, the Ibex Company placed the former at its mercy when contracting for its property. In arranging the price and terms for this property the Ibex Company was acting for itself, and not for the interest of the Glengary Company. Ostensibly, the contract was by the latter, but in fact, it was one which the Glengary Company was compelled to accept at the instance of the Ibex Company. In short, the Ibex Company, although pretending to contract with the Glengary Company, was contracting with itself. Being in control of the affairs of that company for this very purpose, it occupied the relation which that company did to its stockholders, *i. e.*, their trustee. The subject matter of this contract was property of which it was trustee, and in which the shareholders of the Glengary Company, including the minority, were interested as *cestuis que trust*. In law and in fact, it was both parties to this contract. Such a contract is void at the instance of the plaintiffs without regard to whether the Ibex Company was guilty of any actual fraud in obtaining it or not. The judgment of the district court is affirmed.

Affirmed.

JAMES K. HOOK ET AL. (WILLIAM THRASH ET AL. INTERVENORS) V. THE GARFIELD COAL CO.

(112 Iowa 210; 83 N. W. 963. Supreme Court. October 16, 1900.)

An administrator cannot maintain trespass for injuries to real estate of his intestate.

Facts avoiding the above rule. But when the administrators brought suit in trespass; amended their petition by alleging assignment of the right of action from the heirs and defendants made no issue of misjoinder—it was error to direct a verdict for defendants and motion to substitute the heirs as plaintiffs should have been allowed.

No right to lease unopened mines. Where testator's will gave his wife a life estate in his lands, and directed that she should not sell any of the real estate, she had no authority to make a mining lease whereby the lessee might remove all the coal he desired, at a certain royalty, since such lease was a sale of real estate.

Mines opened and abandoned. A life tenant has no implied authority to make a mining lease, where the mines were not in operation at the time of the vesting of the life estate.

A widow whose dower has not been admeasured has no interest in the lands of her husband, so as to make a mining lease thereof.

Appeal from District Court, Mahaska County.

The tenant for life may open new pits to continue working opened mines. *Clavering v. Clavering*, 14 M. R. 358. *Neel v. Neel*, 14 M. R. 363. *Gaines v. Green P. Co.* 15 M. R. 153. *Lynn's App.* 15 M. R. 126.

Power of life tenant to sever. Where under a settlement a tenant for life has power to lease all or any part of the settled lands for building purposes, and also power to lease mines, either with or without the surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased. *Duke of Rutland, in re.* L. R. 2 Ch. (1900) 206.

The interest of a life tenant in oil royalty is interest on the fund during his natural life. *Eakin v. Hawkins*, 52 W. Va. 124; 43 S. E. 211.

Tenant for life is entitled to interest on one-third of sales of oil, the principal going to the remainderman. *Lone Acre Co. v. Swayne*, — Tex. —; 78 S. W. 380.

A. R. DEWEY, Judge.

Action for trespass. Trial to a jury. Directed verdict for defendant, and plaintiffs appeal. Reversed.

BOLTON, MCCOY & BOLTON and DAN. DAVIS, for appellants.

L. C. BLANCHARD and JOHN O. MALCOLM, for appellee.

DEEMER, J. John Thrash died testate January 29, 1887, seised of 40 acres of land in Mahaska county. He left surviving Mary T. Thrash, his widow, and William Thrash, Lawrence A. Thrash, Douglas Thrash, John Thrash, Hilliard Thrash, and Richard Thrash, sons, and Rachel Faulkner, a daughter. The material parts of decedent's will are as follows:

"I give and bequeath unto my wife, Mary T. Thrash, all of my property, both real and personal and mixed, of whatsoever kind and wherever situated, to have and to hold as long as she may live, and to use the same for her support in any manner she chooses, except she is not to sell any of the real estate I may die possessed of. (3) I direct and order that after the death of my wife, Mary T. Thrash, that whatever is left of my estate be disposed of as follows: To my daughter Elvy Thrash, the one thirty-second of all my property. (4) To my daughter, Rachel Faulkner, wife of David Faulkner, the one thirty-second of all my property. (5) All the rest, residue, and remainder of my property I devise and bequeath to my sons, William, Lawrence A., Miletus, Warren, Douglas, John, Hilliard, and Richard, share and share alike."

Mary T. Thrash, widow, was appointed executrix, and duly qualified and acted as such until her death, about the year 1894. She left a will, in which she devised all her property to her children, or the heirs of their bodies, share and share alike. As the estate of John Thrash had not been settled at the time of the death of the executrix, plaintiffs, Hook

and De Long, were appointed administrators of the estate. They were also appointed administrators of the estate of Mary T. Thrash. It is claimed that these administrators were ordered and directed to sell the real estate owned by John Thrash at the time of his decease, for the payment of his debts; but more as to this hereafter.

During her lifetime, Mary T. Thrash entered into a contract of lease of the land before referred to with one Ramsey, for the purpose of mining coal. By the terms of that lease, Ramsey was to operate the mine in a businesslike manner, and to remove all the merchantable coal from the lands, and to pay a royalty of 10 cents per ton for all merchantable coal. Ramsey, with the consent of Mary T. Thrash, assigned his lease to the defendant, and the royalty was reduced to 4 cents per ton. Under this lease the defendant took possession of the land, and proceeded to mine the coal thereon, paying the royalty fixed by the modified lease to Mary T. Thrash. It is not entirely clear how much coal was mined, but, as that is not a material matter, it will be given no further consideration; and, as plaintiffs withdrew all claims made in favor of the estate of Mary T. Thrash for rent, that feature of the case need not be considered. Plaintiffs, Hook and De Long, as administrators of the estate of John Thrash, commenced this action to recover for the coal dug and mined by defendant during the time it was operating under the lease. Thereafter they amended their petition, setting forth the names of the heirs of John and Mary T. Thrash, and reciting the terms of their wills, that the real estate belonged to said heirs by reason of these wills, that the estate of John Thrash was unsettled, and a judgment existed against it in the sum of \$1,400, which was a lien on the real estate, and concluding as follows:

"That in order to avoid a multiplicity of suits, and in order that whatever is due to said heirs by reason of the wrongful acts of the defendants may be used in the discharge of the debts of the estate of John Thrash, deceased, said heirs have authorized and do hereby

authorize the prosecution of this suit by the plaintiffs for the recovery of the amount due from said defendants, and for such purpose they have assigned and do assign to said plaintiffs, and set over, the said claim, and authorize and direct that any judgment obtained in said cause be so entered; and plaintiffs ask, and said heirs with them ask, to be made joint plaintiffs herein, to the end that all wrongful acts of the defendants to the damage of said estate and the said heirs may be fully determined."

On the same day the heirs of John and Mary T. Thrash filed a petition of intervention, which, on defendant's motion, was stricken from the files. As the interveners do not appeal from this order, we need not give this matter any further attention. On the next day plaintiffs filed an amendment to their petition, in the following language, to wit:

"Now come plaintiffs, leave having been given by the court, and amend the amendment filed to petition January 18, 1899, by making the appearance as shown to said pleading to be an appearance for the administrators, and for the parties asking to be joined. Bolton, McCoy & Bolton and Dan. Davis, Attorneys for Administrators and Intervenors."

Motion was made to strike this amendment because of misjoinder of parties. This motion was sustained, and plaintiffs excepted. During the progress of the trial the following record was made:

"The administrators now ask that, if the court has any doubt of their right to maintain this action, the said heirs may be made parties plaintiff, to the end that this claim may not abate, but may be prosecuted to judgment on the record as it now stands. And Bolton, McCoy & Bolton and Dan. Davis, attorneys for plaintiffs, appear for said heirs of John Thrash, and ask in said cause that the said heirs be substituted plaintiffs instead of the administrators, and that the same do not abate, and that the cause be further prosecuted to judgment under the record now made in the name of the administrators, or in the name of the heirs, as the law provides. And they offer to show now that this cause of action for this trespass has been assigned to the administrators, plaintiffs herein, for the purpose of its being prosecuted as trustees for them and for the estate,

to the end that the debts of said estate may be paid. And said heirs, through their attorneys, ask for judgment as prayed, and that the cause be further prosecuted by the administrators; and they hereby submit, and intend to submit, to the judgment of this court in this action, prosecuted either in the name of the administrators, as suggested, or in their name, all the rights they have in this action, to be determined by the judgment and verdict rendered herein, as if the case had originally been brought by them. (Same objection. Sustained. Plaintiffs except.)"

Defendant pleaded in answer the making of the contract of lease with Mary T. Thrash, and the performance of the terms thereof on its part.

At the trial, plaintiffs offered to show who were the heirs of John and Mary T. Thrash; that these heirs authorized them to bring and prosecute the suit for them; that they assigned their claims to the administrators, and authorized them to prosecute these claims to judgment. They also offered to prove the order for the sale of the land to pay the debts of the estate of John Thrash, and that his personal estate was insufficient to pay debts. Each and all of these offers were denied, and exception duly taken. Plaintiffs were permitted to show that defendant took coal from the premises, and that it had undermined at least three-fourths of the surface thereof. They filed a petition for an order requiring defendant to produce books and papers showing the amount of coal mined by it, and the royalties paid. As no ruling seems to have been made on this petition it will not be considered. In attempting to make out their case, plaintiffs proved that a coal mine had been opened by John Thrash many years ago, but that it had been abandoned. This mine was opened under a rock in the bed of a creek running through the land. The shaft opened by the defendant is on another piece of land, but entries are made from that shaft to and under the surface of the land in question. It also appears that some other parties opened a local mine on the Thrash land 15 years ago, and drove a 12-foot entry back

about 20 feet. This opening was almost immediately abandoned, and it soon caved in, and has not been used for more than 15 years. These openings or mines, if they may be so called, were, as we understand it, about the center of the west side of the tract of land. The defendant's shaft through which it mined the coal taken from the Thrash land is east of the south line of the tract, and an entry runs along near the south line from east to west, from which rooms turn off to the north. These rooms vary from 10 to 60 rods in length, but all extend under the surface of the Thrash land. There is no evidence that the vein opened by Thrash during his lifetime is the same one that was mined by defendant, except as it may be inferred from the fact that there is coal under the entire tract, and that it crops out at the places where the mines were originally opened.

Defendant's motion to direct a verdict was based on the grounds: First, that plaintiffs had no capacity or authority to maintain the action; second, that under the terms of the will Mary T. Thrash had authority to lease the premises; and, third, that, as life tenant, she had implied authority to make such a lease. It will not be doubted that plaintiffs, as administrators, had no authority to sue for a trespass on the real estate theretofore owned by John Thrash. Under certain circumstances they were authorized to take possession of the real estate, and apply the rents and profits for the benefit of the persons entitled thereto. Code, § 3333. They might, also, by direction of the court, apply the profits to the payment of claims, if the personal assets were insufficient. Id. § 3334. But as administrators they had no claim for injuries done the land, and could not sue as such for trespass. They did not, it seems, take possession of the real estate under the first section of the statute cited, nor had they any order of court to apply the rents and profits under the second; and it is doubtful, to say the least, whether they could be authorized to take possession of damages accruing by reason

of a trespass, and apply them to the payment of debts. They might, perhaps, have a remedy on the theory of equitable conversion; but, as they do not predicate their right on such a basis, decision of the point is unnecessary. Their right, if any they have, must come from the real parties in interest, who in the absence of a will are the heirs at law, and under a will are the devisees. They allege in their petition that these heirs and devisees have assigned their claims to plaintiffs, and have authorized them to prosecute the claims and obtain judgment thereon. True, they say that they did this to avoid a multiplicity of suits, and in order that the judgment recovered might be used in the payment of debts against the estate of John Thrash. But their purpose in so doing is not material, so long as plaintiffs held the legal title to the claim in virtue of the assignment. No attack was made on the amendment to the petition pleading these facts, and no issue of misjoinder, or of plaintiff's capacity to sue, was tendered by the pleadings. Nevertheless the court refused to permit plaintiffs to prove the heirship of the assignors, or that they had made assignments of their claims to the plaintiffs. This was certainly erroneous. Again, to save the action from abating, plaintiffs' attorneys who represented the heirs asked that the heirs be substituted as plaintiffs before the defendant's motion to direct was filed. This, although discretionary with the court, might well have been allowed; and, while we would not reverse for this ground alone, we think it the better practice to allow such amendments or substitutions. *Taylor v. Adair*, 22 Iowa, 279. Under the allegations of the amended petition which were not attacked, plaintiffs should have been permitted to introduce their proofs; and, as there was no pleading putting in issue plaintiffs' right to sue, the first ground of the motion should have been overruled.

II. The will clearly devised but a life estate to Mary T. Thrash. True, she had the right to use the land for her support in any manner she saw fit, but she was expressly denied

the right of sale. The execution of the mining lease was a sale of the property. The coal underneath the surface was a part of the real estate, and the lease thereof, in the form in which it was executed, was a transfer thereof. *Caldwell v. Fulton*, 31 Pa. St. 475; *Appeal of Duff* (Pa. Sup.) 14 Atl. 364; *Railway Co. v. Sanderson*, 109 Pa. St. 585, 1 Atl. 394. We need not determine whether it passed title to unmined coal, for that question is not in the case. It surely passed title to all that was mined, and was therefore a sale of real estate. Had there been open mines on the premises, that were being worked at the time of the death of John Thrash, there would be room for construction, and perhaps defendant's contention might be sustained. But whatever openings there may have been were utterly abandoned more than 15 years before the testator's death. At that time the land was not being used for mining purposes, and there is nothing to indicate that testator intended it should be so used by the life tenant. Moreover, the will expressly negatives the idea.

III. In view of the limitations put on the express authority of the life tenant, it would seem unnecessary to consider the implied authority of such a tenant. Ordinarily a life tenant may use the premises as he sees fit, provided no injury is done the inheritance. He may work pits or mines that have already been opened, but he cannot open new ones. Those already opened he may work even to the point of exhaustion. He may sink new shafts upon mines already opened, but cannot open new veins. These rules are settled by the following, among other, authorities: *Sayers v. Hoskinson*, 110 Pa. St. 473, 1 Atl. 308; *Reed's Ex'rs v. Reed*, 16 N. J. Eq. 248; *Gaines v. Mining Co.*, 33 N. J. Eq. 603; *Coal Co. v. Cox*, 39 Md. 33; *Livingston v. Reynolds*, 2 Hill, 157; *Coates v. Cheever*, 1 Cow. 474; *Crouch v. Puryear*, 1 Rand. 258. In the *Gaines Case*, *supra*, it is held that a life tenant has a right to use a mine for his own profit, when the owner of the fee, in his lifetime, has opened it, even though

he may have discontinued work for a long period of years; but in the same case the court said that if an opened mine is abandoned before the creation of the life estate, with an executed intention to devote the land to some other use, it will be fatal to the claim of the life tenant to work the mine. Now, while two mines seem to have been opened during the life of the testator, but very little coal was taken therefrom, and they were completely abandoned long before his death. Moreover, there is no showing that the mine opened by the lessee of the life tenant was the same vein as that previously opened by John Thrash. For these reasons, there was no implied authority in the life tenant to use the land for mining purposes, or to authorize another to do so. Something is said in argument regarding the right of Mary T. Thrash, as widow, to sell or lease the land for mining purposes. She undoubtedly had the right to an undivided one-third of the real estate as dower, but her dower was not admeasured during her lifetime; and even if she took an undivided one-third of the land in fee, as co-tenant with the heirs, she had no right to lease the whole for mining purposes. Freem. Co-Ten. § 249a. Dower rights exist in mines already opened during the husband's lifetime, and under our statute, giving the widow one-third in fee, she is entitled to all minerals found on her third after it has been admeasured. Until there has been an allotment in severalty, a co-tenant has no right to use or sell coal found under the entire tract, when the vein has not theretofore been opened. *Williamson v. Jones* (W. Va.) 19 S. E. 436, 38 L. R. A. 694; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. 2. Conceding, for the purposes of the case, that Mary T. Thrash had such an interest in the land after the death of her husband, and before assignment of dower, that she might dispose of the same, or a part thereof, by lease, she had no right to dispose of a part of the whole property; and her act in so doing did not vest in her assignee the right to mine all the coal on or under the land, under the

circumstances disclosed by this record. That a widow may, in equity, sell and convey her dower interest before assignment, is settled in this state. *Huston v. Seeley*, 27 Iowa, 183; *Herr v. Herr*, 90 Iowa, 538, 58 N. W. 897. And a conveyance or disposition of unassigned dower has also been recognized at law. *Larkin v. McManus*, 81 Iowa, 723, 45 N. W. 1061. But the record in this case does not disclose such a state of facts. The defendant claims that it had a right to mine all the coal on the land, in virtue of the lease of the whole from the widow.

The case should have been submitted to the jury, under proper instructions. Reversed.

GRANGER, C. J., not sitting.

JOSEPH T. DONOVAN v. THE CONSOLIDATED COAL CO. OF
ST. LOUIS.

(187 Illinois 28; 58 N. E. 290. Supreme Court. Oct. 19, 1900.)

Authorizing lessee to mine third party's coal. One who knowingly assumes to grant to a mining company the right to mine coal belonging to a third party, and who receives the price for coal so mined, is a trespasser, notwithstanding he does not participate in mining the coal other than by authorizing the mining company to do so.

Measure of damages against negligent trespasser. One who, through negligence or inadvertence, mines coal belonging to another is liable for the value of the coal so mined in its severed condition, at the breast and is not entitled to any allowance for the digging. *Donovan v. Cons. Coal Co.*, 88 Ill. App. 589, affirmed.

Appeal from Appellate Court, Fourth District.

Action by the Consolidated Coal Company of St. Louis against Joseph T. Donovan and others to recover damages for trespasses on coal deposits. From a judgment of the appellate court (88 Ill. App. 589) affirming a judgment in favor of plaintiff, defendant Donovan appeals. Affirmed.

DILL & WILDERMAN and GEO. C. REBHAN, for appellant.

¹*Benson Co. v. Alta Co.* 17 M. R. 488. *Durant Co. v. Percy Co.* 20 M. R. 27.

Negligence to ascertain boundaries does not necessarily make a wilful trespasser, but a deliberate intention to remain ignorant of boundaries does so. *Resurrection Co. v. Fortune Co.* 129 Fed. 668.

The original presumption is that of wilful trespass. *Id.*

When lessee cut timber under honest belief of his right to do so the measure of damages is the value on the stump only. *Lewis v. Virginia-Carolina Co.* 69 S. C. 364; 48 S. E. 280.

Plaintiff is only allowed nominal damages where he does not prove value of the sand taken and exemplary damages are not allowable for a trespass not malicious or persistent. *Murray v. Pannaci*, 130 Fed. 529.

CHARLES W. THOMAS, for appellee.

CARTWRIGHT, J. Appellant owned a tract of $24\frac{1}{2}$ acres of land in St. Clair county, in which was a coal mine known as the "Johnson Mine." He also owned the surface of an adjoining tract on the west, containing 135 acres; but appellee owned the coal under said surface, which had been conveyed to it before appellant obtained his title to the surface. On October 1, 1896, appellant entered into a written contract with the St. Louis & O'Fallon Coal Company, Edward L. Thomas, and John T. Taylor, by which he leased to them, for the term of five years from said date, the Johnson mine, with 1 acre of ground around the shaft, and the machinery and appurtenances, and also granted to them the right to mine and remove the coal underlying said lands, including the coal of appellee, to which he did not have or claim any title; and they agreed to pay him a certain price per ton for all the coal so mined. Under this contract the St. Louis & O'Fallon Coal Company went into possession of the mine, and on November 30, 1896, sublet said mine to Thomas Davis and others, with the right to mine and remove said coal during said term, for which coal the St. Louis & O'Fallon Coal Company was to pay certain prices per ton, stipulated in the contract. Under these arrangements, and by virtue of the right which appellant assumed to grant, over 5,000 tons of coal owned by appellee under the 135 acres were mined and removed. Appellant was paid the price specified in his contract per ton for said coal. Appellee brought this action of trespass in the circuit court of St. Clair county against appellant and the parties who mined and removed the coal, to recover damages occasioned by such mining and removal of its coal. The defendants pleaded the general issue, and, a jury being waived, there was a trial by the court. There was a nonsuit as to all the defendants except the appellant, and there was a finding and judgment against him for \$2,500

and costs. On appeal to the appellate court the judgment was affirmed.

The court held as law a proposition submitted by the plaintiff, that if the plaintiff was the owner of the coal, and the defendant Donovan made the contract authorizing and empowering the St. Louis & O'Fallon Coal Company, Edward L. Thomas, and John T. Taylor to enter upon said coal and dig and carry the same away in consideration of the price per ton to be paid said defendant, and said lessees made some arrangements with other parties under which they dug the coal, and defendant received said price per ton, he was guilty of the trespass. The court refused to hold that, if the defendant Donovan did not participate in mining the coal otherwise than by making the contract under which it was dug and mined, then he was not liable for the trespasses. The action of the court on these propositions is assigned as error, on the ground that the contract of the defendant Donovan did not create any such relation between him and the other parties, or give him any such control over them, as to make him liable for their trespasses. There are cases where a liability may arise out of the relation of the parties, as a master may become liable for the act of a servant, or a principal for that of his agent, although not authorized by him. But questions of that kind are immaterial in this case. It was not sought to hold Donovan liable for some act not authorized by him, but the trespass for which the suit was brought was the identical thing authorized by him. He undertook, without the consent of the plaintiff, to dispose of its coal, and the question is not the same as whether he would have been responsible for a trespass upon adjoining property not mentioned in his contract. Donovan authorized the other parties to commit the trespass in part for his benefit. He authorized them to take plaintiff's coal, and they took it and paid him a stipulated price per ton; and, as he authorized and directed the trespass, he is bound to answer to the plaintiff.

The coal was worth on the cars at the mouth of the pit 65 cents a ton, and the cost of bringing it from where it was mined and putting it on the cars was 13 cents a ton. On the measure of damages the court held as correct the proposition of law submitted by plaintiff, that such measure of damages was the full value of the coal at the mouth of the pit, less the cost of transporting it from the place where it was dug to the mouth of the pit, and, if it was loaded upon railroad cars, the measure of damages was its value after it was so loaded, less the cost of transporting it from the place where it was dug and loading it upon the cars. It is argued that the measure of damages stated in these propositions is not applicable to the case, because the defendant was not a willful trespasser, and that in such case the measure of damages should be the value of the coal as it was in the bank or earth before it was mined. Defendant testified that he had never been in the possession of the coal owned by appellee, and never claimed title to it; that he knew it was owned by the plaintiff; that he had a large plat upon the wall in his office, and, in making the contract, failed to remember that the coal had been sold to plaintiff; and that he could give no other explanation of his contract, and never intended to dispose of plaintiff's coal. The rule contended for was given in *Robertson v. Jones*, 71 Ill. 405; but this court reversed the judgment because of giving it, and laid down the rule stated in the proposition in this case. Afterwards, in the case of *Illinois Coal Co. v. Ogle*, 82 Ill. 627, this question of the measure of damages was fully considered. In that case the trial court instructed the jury that if the defendant, by its servants and employes, mined coal from the plaintiff's land without his consent, as alleged in his declaration, and did so by mistake or inadvertence, without knowledge that the coal was being mined from the plaintiff's land, the jury were bound to allow plaintiff the value of the coal at the pit mouth, less the cost of carrying it from the place where it was dug,

allowing defendant nothing for the digging. The instruction was held to be correct, and the court, upon a review of authorities, said (page 630): "No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken." In *Illinois Coal Co. v. Ogle*, 92 Ill. 353, the court declined to change the rule adopted, and expressed the belief that it rested on sound legal principles, and was suggested by a wise and just policy.

Although the value of coal may be increased by mining it and removing it to the surface by the labor of the wrongdoer, the owner is entitled to its full value in its severed condition, and the trespasser can take no advantage of his labor. There was no disputed title to the coal, and the defendant Donovan did not grant the right to mine and carry it away under a bona fide belief that he had a right to do so. His act in granting the right to mine it and take it away was not the result of an innocent mistake, but of his own negligence. The measure of damages stated in the proposition was correct. Hil. Torts, 419; 1 Add. Torts, par. 458.

The judgment of the appellate court is affirmed.

Judgment affirmed.

M. B. JOHNSON ET AL. v. DANIEL MUNDAY.

(104 Federal 594. Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

¹Ejectment and not a bill in equity is the proper suit to support an adverse claim, the plaintiffs' title being a purely legal one. The Federal Courts have no jurisdiction to try a suit supporting adverse claim as a case arising under the laws of the United States.

Appeal from the Circuit Court of the United States for the District of Colorado.

ALBERT SMITH (CHARLES J. HUGHES, JR., on the brief),
for appellants.

CHARLES M. BROWN, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. M. B. Johnson and others filed an adverse claim against Daniel Munday to enter the Claire Maire and Maggie M. lode-mining claims in the land office at Denver, Colo., and brought an action at law in the United States circuit court in support of their adverse claim. A demurrer to the complaint in the action at law was sustained, whereupon the court, for some reason not disclosed by the record, ordered that the plaintiffs have "leave to file a bill in equity asserting title to the premises in controversy." Thereupon, the plaintiffs filed their bill in equity in this suit. The defendant demurred to the bill upon the ground, among others, that: "The matters and

¹*Burke v. McDonald*, 2 Ida. 310; 13 Pac. 351. *Manning v. Strehlow*, 11 Colo. 451; 18 Pac. 625. *Becker v. Pugh*, 15 M. R. 304. See notes to *Murray v. Polglase*, 20 M. R. 296.

things set out in said bill of complaint, and for which relief is sought, are not cognizable in a court of equity." This demurrer was overruled, and the question raised by it is the only one we find it necessary to consider. The bill sets up and counts on a purely legal title to the premises in controversy acquired by the purchase of the same at sheriff's sale. No ground of equitable cognizance is alleged or shown. It is an ejectment bill pure and simple. It states a good cause of action at law, but not one within the jurisdiction of a court of equity. The bill rests the jurisdiction of the court in the action upon the diverse citizenship of the parties, and also upon the ground that an action in support of an adverse claim is one arising under the laws of the United States, of which the federal court has jurisdiction regardless of the citizenship of the parties; but since the decisions of the supreme court in the cases of *Blackburn v. Mining Co.*, 175 U. S. 571, and *Shoshone M. Co. v. Rutter*, 177 U. S. 505, the last ground upon which the jurisdiction is claimed is untenable. The decree of the circuit court is reversed, and the cause remanded, with instructions to that court to dismiss the bill for want of jurisdiction in equity, without prejudice to the complainants' right to assert their claim at law.

PARROT SILVER & COPPER COMPANY v. A. P. HEINZE ET AL.

(24 Montana 485; 62 Pac. 818. Supreme Court. Nov. 26, 1900.)

Judicial discretion on conflicting testimony. Where there is substantial evidence to sustain the plaintiff's contention as to the identity of the vein trespassed upon as he alleges, the discretion of the Court below in allowing an injunction will not be reversed although the evidence to the contrary makes a sharp conflict.

The court will not investigate alleged errors where counsel fail to show that they were prejudicial to his client.

Appeal from District Court, Silver Bow County; **HENRY C. SMITH**, Judge.

A mining injunction is largely a matter of discretion. *Anaconda Co. v. Butte Co.* 17 Mont. 519; 43 Pac. 924.

Defendants denied that they polluted or intended to pollute a stream. Held, that they were not prejudiced by a writ enjoining them from so doing. *Glassell v. Verdugo*, 108 Cal. 503; 41 Pac. 403.

Case strong enough for temporary injunction, not necessarily as strong as would be required for permanent. *Buskirk v. King*, 72 Fed. 22.

Refused where equities denied, proof uncertain and more harm to defendant than good to plaintiff likely to result. *Crescent Co. v. Silver King Co.* 14 Utah 57; 45 Pac. 1093.

Insolvency of defendant not material; discretion of court to be exercised. *Boyd v. Desrozier*, 20 Mont. 444; 52 Pac. 53.

Slight doubt as to plaintiff's title will not defeat. *Hunt v. Steese*, 75 Cal. 620; 17 Pac. 920.

Will not issue where defendant has fair title. *Smith v. Jamison*, 91 Mo. 13; 3 S. W. 212.

Will lie where title seriously in doubt though no issue in law made. *Bishop v. Baisley*, 28 Oreg. 119; 41 Pac. 936.

What amounts to disputed title between legal and equitable claimants. *St. Louis Co. v. Montana Co.* 17 M. R. 658.

Equity may enjoin trespass and pass on rights of title at same time. *Oolagah Co. v. McCaleb*, 68 Fed. 86.

Injunction lies in favor of the lessee of oil and gas land against the sinking of a well by a third party. *American Co. v. Tate*, — Ind. App. —; 71 N. E. 189.

Where oil territory is in litigation on proper facts the lower court may sequester the property pending an appeal taken. *State v. DeBaillon*, — La. —; 37 So. 534.

Application for injunction by the Parrot Silver & Copper Company, a corporation, against A. P. Heinze and others. From an order granting the same, defendants appeal. Affirmed.

McHATTON & COTTEE, for appellants.

WM. SCALLON, J. K. McDONALD, and T. J. WALSH, for respondent.

BRANTLEY, C. J. This is an appeal from an order granting an injunction *pendente lite*. The plaintiff is the owner of the Little Mina lode claim, situate in the county of Silver Bow. This claim lies in a northwesterly and southeasterly direction. Immediately south of the easterly half of the claim lies the Nipper lode claim, which, at the time this action was begun, was occupied and worked by defendant A. P. Heinze as a lessee of defendant F. A. Heinze, the owner. This latter claim lies nearly due east and west. As ground for the injunction plaintiff alleges that within the boundaries of the Little Mina claim are two veins, the apex of one of which, known as the "discovery vein," extends throughout the entire length of the claim, while that of the other, or more southerly one, extends from the westerly end line of the claim approximately parallel with the south side line thereof to a point 205 feet west of the easterly end line of the claim, where it passes into the Nipper claim; that the part of this latter vein which is within the boundaries of the Little Mina claim in its downward course dips to the south, and so far departs from the perpendicular as to extend outside of the vertical plane of the southerly side line, and to enter the ground lying south of the Little Mina claim; and that the defendants, by means of underground workings, have entered upon the portions of said vein west of the point at which it crosses the southerly side line of the Little Mina claim, and

through these workings are engaged in mining, removing, and converting to their own use large quantities of ore which belong to the plaintiff.

The defendants deny that they are trespassing upon the vein, or any part of the vein, or any vein, which has its apex in the Little Mina claim, and allege that the vein upon which A. P. Heinze is engaged in mining has its apex in the Nipper claim.

At the hearing evidence was submitted, both oral and written, as to the identity of the vein in dispute with that having its apex within the boundaries of the Little Mina claim. The district court was of the opinion that this evidence was sufficient to warrant the issuance of the injunction as to A. P. Heinze, his agents and employes. The question submitted to us is whether the court's discretionary power was properly exercised.

After a careful examination of the record and the briefs of counsel, we have concluded that there was no abuse of discretion. The transcript reveals a sharp conflict in the statements of the witnesses, both as to matters of fact gained from actual observation of the workings in the properties and in matters of expert opinion based upon these facts. But, inasmuch as there was substantial evidence tending to establish the identity of the vein in the Nipper claim upon which the defendant A. P. Heinze was engaged in mining, with that owned by the plaintiff, we think it proper that the order should stand pending the final determination of the controversy. *Boyd v. Desrozier*, 20 Mont. 444, 52 Pac. 53; *Anaconda Copper M. Co. v. Butte & Boston M. Co.*, 17 Mont. 519, 43 Pac. 924; *Heinze v. Mining Co.*, 20 Mont. 528, 52 Pac. 273.

Several errors are assigned in appellants' brief touching the admissibility of certain evidence. Counsel fail, however, to point out in the argument wherein the rulings made by

the court upon this evidence resulted in any prejudice to the appellants. Under the circumstances we do not feel that it is incumbent upon us to examine them.

Let the order be affirmed.

Affirmed.

WORD, J., being absent, takes no part in this decision.

MANUFACTURERS' GAS & OIL COMPANY ET AL. v. INDIANA
NATURAL GAS & OIL COMPANY.

(155 Indiana 545; 58 N. E. 706. Supreme Court. Nov. 27, 1900.)

¹State cannot prohibit transportation from State. The act of 1889 (Acts 1889, p. 369), in so far as it attempts to prohibit the owner of natural gas from transporting the same by safe methods out of the State, contravenes the federal Constitution relating to interstate commerce, and is void, since natural gas, when reduced to possession, is an article of commerce.

Appeal from Circuit court, Grant County; H. J. PAULUS, Judge.

Injunction by the Manufacturers' Gas & Oil Company and others against the Indiana Natural Gas & Oil Company. From a judgment for defendant, complainants appeal. Affirmed.

ROLLIN WARNER, A. W. BRADY, and WM. A. KETCHAM, for appellants.

W. O. JOHNSON, FOSTER DAVIS, J. C. BLACKLIDGE, C. C. SHIRLEY, and CONRAD WOLF, and M. WINFIELD, for appellee.

DOWLING, C. J. This action was brought to enjoin the appellee from transporting through pipes natural gas from the gas fields described in the complaint, within the state of Indi-

¹Natural gas is an article of commerce. *State v. Indiana & Ohio Co.* 120 Ind. 575; 6 L. R. A. 579.

The statute regulating gas pressure is valid. *Jamieson v. Indiana N. G. Co.* 128 Ind. 555; 12 L. R. A. 652. *Manufacturers' Co. v. Indiana Co.* 20 M. R. 672. And the statute to prevent waste of gas. *Ohio Oil Co. v. Indiana*, 20 M. R. 466.

ana, to any point without the state. The complaint is substantially the same as that in *Manufacturers' Gas & Oil Co. v. Indiana Nat. Gas & Oil Co.* (155 Ind. 461; 20 M. R. 672) excepting that it omits the allegation as to the use of artificial processes for the purpose of increasing the natural flow of the gas from the wells, and in that it charges that the appellee is engaged in transporting natural gas by means of pipe lines from the state of Indiana to the city of Chicago, in the state of Illinois.

The suit is founded upon the act of March 9, 1889, which contains these provisions:

"Section 1. Be it enacted," etc., "that it shall be unlawful for any person, or persons, company, corporation, or voluntary association, to pipe, or conduct natural gas from any point within this state, to any point or place without this state. * * *"

"Sec. 3. That any person, or persons, company, corporation, or voluntary association, or any officer, director, or agent of such corporation, that shall violate any of the provisions of this act, upon conviction thereof shall be deemed guilty of a misdemeanor, and shall be fined in any sum not less than one hundred dollars, or more than one thousand dollars." Acts 1889, pp. 369, 370.

In the absence of legislative restriction, the transportation of natural gas to points without the state would, undoubtedly, be legal, and such use and disposition of the article probably could not be interfered with or prevented. The right of the appellants to relief by way of injunction, if it exists at all, must be derived from the statute. But in *State v. Indiana & Ohio Oil, Gas & Mining Co.*, 120 Ind. 575, 22 N. E. 778, this court held the act of March 9, 1889, invalid, for the reason that it affected interstate commerce; natural gas, when reduced to possession, in reservoirs or pipes, being recognized as an article of commerce. The doctrine stated in that case was reasserted in *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76, and it has not since been questioned in any other decision of this court. It is not alleged in the complaint be-

fore us that the appellee is appropriating an undue proportion of the common fund or supply of gas, or that it is using any device or artificial means to produce an unnatural flow of gas from its wells, to the injury of the appellants. Neither is it charged that the means adopted by the appellee for transporting the gas are, in any respect, improper, dangerous to life or property, destructive of the common supply, or likely to inflict injury of any kind upon the appellants. The right of the appellee to take gas from its own wells in the manner adopted by it is not denied. Nothing done by the appellee is complained of, excepting only that it removes natural gas out of the state of Indiana. No ground for the exercise of the police power of the state to prevent such removal is shown. Nothing, save the naked right to transport the gas beyond the limits of this state, is contested in this action. The only reason which can be urged in support of the restraint sought to be imposed upon the appellee is that, the supply of natural gas being limited, and the article being one of great value and convenience, its use ought to be reserved for and enjoyed by the people of this state, to the exclusion of the inhabitants of any other state. But, as natural gas, when reduced to possession, is held to be a commercial commodity, its owner cannot lawfully be prevented from carrying it to and selling it in whatever market he may consider most advantageous. It is true that the supreme court of the United States has recently held in *Geer v. Connecticut*, 161 U. S. 519, that a statute prohibiting the transportation of wild game beyond the limits of the state in which it is taken or killed is not in conflict with the constitution of the United States. But the distinction between animals *feræ naturæ* and natural gas in respect of their ownership before reduction to possession is a very plain one, and has been clearly pointed out in numerous decisions. *Manufacturers' Gas Co. v. Indiana Nat. Gas Co.*, *supra*.

In the case of wild animals, before they are reduced to

possession, the ownership is in the public, and not in any private person; and they are, therefore, held to be subject to the protection of the sovereign. The privilege of taking, killing, and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to or control over the gas in the ground. On the contrary, so far as it is susceptible of ownership, it belongs to the owners of the superincumbent lands in common, or, at least, such landowners have a limited and qualified ownership in it to the entire exclusion of the public.

To the extent that the act of March 9, 1889, attempts to prohibit the owner of natural gas which has been reduced to possession by proper and lawful means from transporting it by safe and reasonable vehicles or conduits out of the state of Indiana, it contravenes the provisions of the federal constitution relating to interstate commerce, and is, therefore, void. No other foundation for the claim of the appellants to relief by way of injunction being disclosed, the complaint must be held insufficient. The demurrer thereto was properly sustained. Judgment affirmed.

SOUTH PENN OIL CO. ET AL. V. MARY EDGELL ET AL.

(48 West Virginia 348; 37 S. E. 596. Supreme Court of Appeals.
Dec. 1, 1900.)

Relief in equity to forfeited lease. The forfeiture clause in a gas and oil lease, under which a valuable estate vested in the lessee in so far as the rentals are concerned, made payable in gas, oil, and money, is in the nature of a penalty to secure such rentals, against which a court of equity will grant relief when compensation for such rentals can be fully made, and great loss wholly disproportionate to the injury occasioned by the breach of the contract would otherwise result to the lessee negligently, but not fraudulently, in default.

(Syllabus by the Court.)

Appeal from Circuit Court, Pleasants County; LEWIS N. TAVENNER, Judge.

Bill by the South Penn Oil Company and others against Mary A. Edgell and others. From a judgment refusing to dissolve an injunction, defendants appeal. Affirmed

McCLUER & McCLUER, V. B. ARCHER, and WILLIAM BEARD, for appellants.

U. N. ARNETT and A. B. FLEMING, for appellees.

¹*Edwards v. Iola Co.* 65 Kans. 362; 22 M. R. —.

Relief in equity against forfeiture and incidents which prevent enforcement of forfeiture.

Forfeiture not enforceable in equity, not favored in law. *Henry v. Mayer* (Ariz.); 53 Pac. 590.

Equity will not enforce a forfeiture to unseat a prior lessee in favor of new lessees. *Grummett v. Gingrass*, 77 Mich. 369; 43 N. W. 999.

No case made out for forfeiture for not timbering when no accident has occurred for want of timbers. *Ruffatti v. Société Anon.* 10 Utah 386; 37 Pac. 591.

DENT, J. Mary A. Edgell and others appeal from a decree of the circuit court of Pleasants county overruling a motion to dissolve and continuing an injunction against them in favor of the South Penn Oil Company and the Victor Oil & Gas Company.

The appellees held a lease of all the oil and gas under a certain tract of land belonging to the appellants. In addition to a cash consideration of \$500 paid, the appellees were to pay \$300 per year in semi-annual payments for the use of the gas from the well already drilled by them, also one-eighth of the oil produced, and the following stipulations were made a part of such lease, under a compromise agreement, to wit:

"And it is further agreed, as a part of the consideration of this agreement and compromise, that the said Mary A. Edgell, her heirs or assigns, shall have the right to connect a service line with the gas line of the first parties, near said gas well, and at her own cost and expense lay a service line from said well connecting to the dwelling house occupied by her on said land, and have the use of the gas from said well for domestic purposes in such dwelling house, free of charge, so long as the first parties, or those holding under them, use or utilize the gas from said well. Such connections and service line, and all fixtures, shall be made, placed, and kept in repair at the expense of said Mary A. Edgell, at her risk; it being understood by the second parties that the pressure of gas from said gas well is uneven and variable, and that the use thereof is danger-

Lessee was in default for non-payment of royalties, etc., which was verbally waived. While in default plaintiff got possession by collusion with defendant's superintendent. *Held*, that non-payment of rent did not of itself work a forfeiture and possession must be restored. *Wakefield v. Sunday Lake Co.* 85 Mich. 605; 49 N. W. 135.

Delay in demanding rent and other incidents which will prevent its exercise. *Lynch v. Versailles Co.* 18 M. R. 149.

After forfeiture accrued, if the lessor condone and indulge, he cannot afterwards arbitrarily declare forfeiture. *Hukill v. Myers*, 36 W. Va. 639; 15 S. E. 151.

One party cannot enforce a forfeiture where he is himself in default. Forfeiture strictly construed. *Ingram v. Golden Co.* 25 Wash. 318; 65 Pac. 549.

ous, and that the first parties are not to be liable in any wise and on any account to the second parties, or to the said Mary A. Edgell, or those holding under her, for any injury she or they may receive, or any damage which she or they may sustain, by reason of her so connecting her said service line with the gas line or said well, the said parties, or Mary A. Edgell, taking all risks; and, if from any cause the gas from the said gas well be not used or utilized, then said second parties are to have gas for domestic use free of cost as aforesaid, until said well is abandoned; and should said well be abandoned, and there be other well or other wells hereafter drilled by said first parties or their assigns, then said second parties are to have gas from said well or wells as aforesaid; and, if the said first parties fail or refuse to pay, keep, and perform any of covenants or obligations that they have agreed to or undertaken in the original lease or in the compromise, then, and in that event, the lease and this compromise contract is at an end, as fully and completely as if the lease and compromise had never been made and entered into."

The officers and agents of the appellees, having lost sight of this part of their lease which was contained in a compromise agreement, sought to compel Mrs. Edgell to sign a new contract of release of risk of damage, and to pay for the gas used by her. She refusing to do so, they disconnected her service pipe so as to deprive her of the use of the gas, partly, as they claim, because she was wasting and misusing the gas, but principally, as the evidence shows, because they were not aware of the foregoing stipulation as belonging to

Where a lease provides for forfeiture for not working the quarries; removing water is work and avoids forfeiture. *Miller v. Chester Slate Co.* 129 Pa. 81; 18 Atl. 565.

A right to insist on forfeiture for failure to sink an oil well is waived by acquiescence in a failure to sink two or three other wells which were to have been sunk before. *Duffield v. Hue*, 17 M. R. 253.

Where the lease provided for three months' grace before forfeiture, for any breach of its covenants, such grace applies to non-payment of the royalties. *Hoch v. Bass*, 126 Pa. 13; 17 Atl. 512.

Equity will relieve against but not enforce a forfeiture. *Blodgett v. Lanyon Z. Co.* 120 Fed. 894.

Relief in equity against forfeiture of an assignment of lease for short delay in installment payment. *Jones v. Scott*, 209 Pa. 177; 58 Atl. 281.

their lease. This was a matter of plain negligence on the part of some of the officers or counselors of the appellees, for they had possession of a copy of the contract, and by proper diligence could have been fully informed of its contents. She made application to be allowed to reconnect the pipe and use the gas. This appellees refused. Thereupon Mrs. Edgell, as a matter of retaliation, declared a forfeiture of the whole contract, and seized possession of the property, including the gas and oil well, and all the appellees' machinery and fixtures in connection therewith. Appellees then filed their bill for an enforcement of their lease, and for relief from the forfeiture thereof, if the same were legal. Under the prayer for general relief in a case of this character, relief from forfeiture could be granted. There is no question that equity has jurisdiction of the matters in controversy, as alleged in the bill. 22 Am. & Eng. Enc. Law, 972; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271; *Eclipse Oil Co. v. South Penn Oil Co.* (W. Va.) 34 S. E. 923. "A court of equity will often relieve a tenant from an attempted inequitable forfeiture unless the tenant's breach was willful, and particularly when the breach or default was a result of accident or mistake." 12 Am. & Eng. Enc. Law, 758q. The breach in this case came from a negligent mistake, but it was not willful in a legal sense. To be so, it must be knowingly committed. The appellees, having discovered the gas and oil under appellant's property, had a vested estate therein. Out of this estate, and as a part consideration therefor, they had granted to Mrs. Edgell gas for domestic use. While they fully complied with all the other conditions of their lease, and paid the rentals therefor, this grant they overlooked, and temporarily deprived her of the benefits thereof, until they found out their mistake. This is not a plain, open, knowing, and willful violation of the contract, but it is merely a denial of part of the consideration thereof through oversight or mistake. "In general, the exercise of a restraining power of a court of equity against for-

feitures depends upon the peculiar circumstances of the particular case; whether the forfeiture will work a hardship at the time not contemplated when the contract was made or other general grounds of equitable relief." 12 Am. & Eng. Enc. Law, 758p. In the case of *Ganer v. Hannah*, 6 Duer, 273, Judge Slosson says: "I take the rule to be well settled that equity will readily, where the breach is not willful, relieve from forfeiture or penalty, as where the stipulation is intended as a mere security for the payment of money, and precise compensation can be made."

In the case of *Davis v. West*, 12 Ves. 475, the chancellor says: "That where covenants are broken and there is no fraud, and the party is capable of giving complete compensation, it is the province of a court of equity to interfere to give the relief against forfeiture for breach of other covenants as well as that for payment of rent." In Story, Eq. Jur. § 1314, it is said: "The general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the nonperformance. In every such case the true test (generally, if not universally) by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill, and will direct an issue of *quantum damnificatus*, and, when the amount of damages is ascertained by a jury upon the trial of such an issue, they will grant relief on payment of such damages."

The forfeiture clause was inserted in the compromise lease under discussion, so far as the rent is concerned, as a penalty to secure the payment of the rent partly in money, and partly in gas and oil. "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. * * *

Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal object. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice or fraud or oppression or harsh or vindictive injury." Story, Eq. Jur. 1316. "Where the condition of forfeiture is merely a security for the nonpayment of money (such as a right of re-entry upon or nonpayment of rent), there it is to be treated as a mere security, and in the nature of a penalty, and is accordingly relievable." Story, Eq. Jur. 1321. The gas to be furnished and denied in this case was strictly rent, being a part of the consideration for the compromise lease, the value of which could be easily ascertained in money. All the agents of the appellees, acting under a mistake as to Mrs. Edgell's rights, asked of her was to sign a contract agreeing to pay \$2 per month for each gas fire in her house during the winter, and \$1.50 per month during the summer. The gas was only shut off for about one week, so that the pecuniary value thereof was very small. The appellants claim, on account of cold

weather, they suffered large consequential damages. The matter of damages has not yet been considered by the circuit court, and is not before this court. *State v. Reymann* (decided at this term), 37 S. E. 591.

The question of mistake has little to do with this case, except as furnishing an excuse for the conduct of appellees' agents, and to show that they thought they were justified therein, and did not act fraudulently or knowingly. Being a matter of negligence on their part, it could not furnish a legal excuse for their conduct. This case is determined on the fact that the gas was a rental consideration, easily ascertainable in money, and that, so far as it was concerned, the forfeiture was in the nature of a penalty to secure the gas right to the appellants, against which a court of equity will grant relief on the payment of the damages, to be properly ascertained, for the breach of the condition of their contract on the part of the appellees and their agents.

The decree is affirmed.

Affirmed.

MARK K. LOWRY ET AL. V. SILVER CITY GOLD AND SILVER
MINING CO.

(179 U. S. 196; 21 Sup. Ct. Rep. 104. Supreme Court. Dec. 3, 1900.)

- ¹The lessees of the owners of a lode cannot by going through the forms of law appropriate to themselves the property of their lessors.
- ²New discovery shaft. When a discovery shaft is covered by a patent on an overlapping claim but the owners sink a new discovery shaft disclosing the vein their title is not invalidated. Such case distinguished from *Guillim v. Donnellan*, 15 M. R. 482.

ERROR to the Supreme Court of the State of Utah to review a decree sustaining the title of the lessor of a mining claim against the claims of lessees. Dismissed.

Reported below, 19 Utah, 334, 57 Pac. 11.

¹*Largey v. Bartlett*, 18 Mont. 265; 44 Pac. 962. *Fisher v. Seymour*, 23 Colo. 542; 49 Pac. 30.

²Allowing discovery shaft to be patented avoids the claim. *Miller v. Girard*, 3 Colo. App. 278. Affirmed, *Girard v. Carson*, 18 M. R. 348. Claim void where sunk on subsisting claim. *Watson v. Mayberry*, 15 Utah 265; 49 Pac. 479. *Reynolds v. Pascoe*, 24 Utah 219; 66 Pac. 1064.

Claim recorded in Canada with discovery across the U. S. boundary line held void. *Madden v. Connell*, 20 M. R. 158.

Where location of defendant in possession is disputed on the ground of discovery within a previous location, plaintiff must prove such previous location. *Copper G. Co. v. Allmann*, 21 M. R. 296.

Burden of proof on defendant alleging prior location to show actual discovery. *Sands v. Cruikshank*, 15 S. Dak. 142; 87 N. W. 589.

Discovery shaft on boundary line including only a part of the top of the lode held good. *Larkin v. Upton*, 17 M. R. 465.

Same discovery can not be used for two claims. *Reynolds v. Pascoe*, *supra*. *Poplar Creek Mines*, 16 L. D. 1.

Discovery is essential to a valid location. Although located, until discovery it is government land. Discovery on another claim is void. *Tuolumne Co. v. Maier*, 21 M. R. 678. *Beals v. Cone*, 20 M. R. 591.

On January 1, 1889, the Wheeler Lode mining claim, a claim 1,500 feet in length by 600 feet in width, was duly located on the mineral lands situated in the Tintic mining district, Juab county, Utah. The title to the claim passed to the defendant in error, and its right thereto was kept alive by regular performance of the prescribed annual work. On February 8, 1897, it leased this claim to two of the plaintiffs in error, Lowry and DeWitt, for eighteen months, and those lessees went into possession and continued work on the mine. On June 4, 1897, the owners of a mining claim called the Evening Star applied for a patent, and included in their application a portion of the Wheeler claim. They published due notice of their application, and the sixty days given by statute for commencing an adverse suit passed without any such suit by the defendant in error, the owner of the Wheeler mining claim. Thereupon the two lessees, together with the other plaintiff in error, Smith, attempted to locate a new claim, called the Little Clarissa, upon the ground covered by the Wheeler claim. This attempted location was made two or three days after the expiration of the sixty days' publication by the owners of the Evening Star, and while the lessees were in possession under the lease from the owner of the Wheeler claim. It appears by the surveys that the premises claimed by the Evening Star included the original discovery shaft of the Wheeler location, the same being within $2\frac{1}{4}$ feet from the boundary line. It also appears that the original discovery shaft of the Wheeler claim was sunk only about $9\frac{1}{2}$ feet in depth, and was then practically abandoned; that the vein was traceable and was traced on the surface for something like 500 feet within the boundaries of the Wheeler location, and that thereafter and many years before the lease referred to a new shaft had been sunk on that vein some 200 or 300 feet in depth at a point far outside of the Evening Star location and entirely within the limits of the Wheeler location, and that this was the condition at the time the lease

was executed. The contract of the lessees was that they should sink this shaft a depth of at least 6 feet each month during the life of the lease and should not allow or permit any miner's or other liens to be filed against the claim, or suffer any act or thing whatever to be done whereby the title of the defendant in error to the claim should be encumbered. After the location by the plaintiffs in error of the Little Clarissa claim, and a repudiation by them of the obligations of the lease, the defendant in error filed its bill in the district court of Utah in and for the county of Juab, to quiet its title, restrain the defendants from occupying the premises, and for restitution thereof. This suit was commenced after the publication by the locators, the lessees, and Smith, of an application for a patent for the Little Clarissa mine, and within the sixty days required for commencing an adverse suit. The district court entered a decree quieting the title of the plaintiff, ordering restitution, and enjoining the defendants from entering upon the premises, or in any way interfering with plaintiff's possession and enjoyment of the premises. This decree was affirmed by the supreme court of the state (19 Utah, 334, 57 Pac. 11), and thereupon this writ of error was brought.

O. W. POWERS, ARTHUR BROWN, and H. P. HENDERSON,
for plaintiffs in error.

C. S. VARIAN and F. S. RICHARDS submitted the case for
defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the
opinion of the court:

This was plainly an attempt on the part of the plaintiffs in error—two of whom were lessees of the defendant in error—under the forms of law to appropriate to themselves property which for years had been in the unchallenged possession

of the defendant in error, and upon which it had expended many hundreds of dollars. That such attempt was unsuccessful in the courts is no more than was to be expected.

The supreme court of the state placed its decisions upon two grounds: First, that, although the Evening Star claim included the original discovery shaft of the Wheeler claim, it did not thereby destroy that claim in view of the fact that long prior to the location of the Evening Star the owners of the Wheeler had located a new shaft and developed the mine in that shaft. *Gwillim v. Donnellan*, 115 U. S. 45, was held not applicable. The other ground was estoppel by virtue of the lease under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court. *Eustis v. Bolles*, 150 U. S. 361. See, also, *De Lamar's Nevada Co. v. Nesbit*, 177 U. S. 523, and cases cited in the opinion.

The writ of error is

Dismissed.

JOHN HEALEY ET AL. v. ALBERT J. RUPP.

(28 Colorado 102; 63 Pac. 319. Supreme Court. December 3, 1900.)

Praying inconsistent instructions. A party cannot complain of the refusal of an instruction which states the law differently from another instruction prayed by the same party and given.

¹Discovery on boundary line. A discovery shaft is not invalidated from the fact that it is partly on hostile ground, if it shows mineral within the boundaries of its own claim.

Visit of strangers to shaft. Where it was contended that a shaft had been "salted" the visits and suspicious actions of designated parties seen at the shaft at night is admissible although there was no evidence that such persons were connected with defendants or interested in the controversy.

²Rejection of proof of an assay taken from the dump of a discovery shaft, the existence of a vein in which shaft was a material issue, is reversible error.

Appeal from District Court, Lake County.

¹*Larkin v. Upton*, 17 M. R. 465.

²By assay with litharge (as witness testified) a trace of silver may be found in any kind of rock. *Ormond v. Granite M. Co.* 11 Mont. 303; 28 Pac. 289.

Suit for breach of contract to save a certain per cent of values. Discussion of assays, how proved in such case. *Pittsburg Co. v. Glick*, 7 Colo. App. 43; 42 Pac. 188.

Sufficient proof by assays that samples were salted with powdered silver. *Mudstill M. Co. v. Watrous*, 18 M. R. 1.

Comparison of car samples and mill samples; mill samples control. *Fox v. Hale Co.* 108 Cal. 475; 41 Pac. 308.

Question: Was it a fair assay? not allowable. *Fox v. Hale Co.* (Cal.) 53 Pac. 32.

Assay value of gold means the exact value and not the value of gold bullion as shipped from the district. *Vietti v. Nesbitt*, 18 M. R. 247.

Imported ores, how assayed. *In re Puget Co.* 96 Fed. 90.

"An assay is the test of the value of a specimen or quantity of ore by the extraction of the amount of silver, gold or other metal, contained in a minute but exact fraction, which amount is supposed to be proportionate to the whole amount found in the quantity from which the fraction was obtained." *Mining Rights* (11th Ed.) 341.

Action by Albert J. Rupp against John Healey and others. From a judgment for plaintiff, defendants appeal. Reversed.

The subject of this controversy is the conflict between two lode-mining claims, known as the "Canestota" and the "Last Batch." Appellee, as plaintiff, and owner of the former, brought this action in the court below in support of his adverse against the application of appellants, as defendants, for patent to the latter. From a judgment in favor of plaintiff, the defendants appeal.

The Last Batch bases its location as of October 11, 1887, and the Canestota as of January 13, 1896. The discovery shaft of the Canestota discloses no vein or mineral whatsoever. It is the point designated "Discovery" on this location. The existence of a vein in the discovery shaft of the Last Batch is controverted. For the purpose of establishing the discovery of mineral within the boundaries of the Canestota, evidence was introduced on behalf of plaintiff to the effect that in a shaft known as the "Price," sunk partially within the boundaries of that location and an adjoining one, known as the "Salina," mineral was discovered in that part within the Canestota. No location of the Canestota was made upon this alleged discovery. On behalf of defendants the following instruction was requested and refused:

"The jury is instructed that a discovery of mineral, within the meaning of the statute of the state of Colorado upon that subject, requires that such discovery shall be made in the discovery shaft upon which the location is based. A discovery of mineral elsewhere than in the discovery shaft will not avail, and if you believe from the evidence in this case that there has been no discovery of mineral, as hereinbefore defined, in the discovery shaft of the Canestota location, in such case the plaintiff cannot prevail in this action."

At the instance of defendants the court instructed the jury as follows:

"* * * To make a valid location of a mining claim, a citizen of the United States, or one who has declared his intention to become such, must enter upon the unoccupied, unappropriated, and unclaimed mineral domain of the United States, and discover within the limits of the claim located a vein, lode, ledge, or deposit of mineral-bearing rock in place, and substantially comply with the following requirements:

"First: Sink a discovery shaft upon the lode to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.

"Second: Post at the point of discovery on the surface a plain sign or notice containing the name of the lode and the name of the locator and the date of discovery. * * *

"2. The court further instructs you that if you believe from the evidence in this case that the defendants or their grantors, being citizens of the United States, or having declared their intention to become such, made a valid discovery of a vein or lode of mineral-bearing rock in place, carrying gold, silver, or lead in appreciable quantities, within the exterior bounds of the Last Batch lode-mining claim, and duly located their said claim, and filed a location certificate thereof as required by law, and if you also find that their discovery of such vein antedates any valid discovery made on the Canestota claim by plaintiffs, then the defendants have the better right, and are entitled to a verdict in their favor.

"3. * * * So, in this case, if you find from the evidence that the Last Batch location in all things conformed to the law, save and except the finding of mineral within the discovery shaft, and if you further find from the evidence that such mineral was found on the Last Batch claim, in rock in place in the general mass of the mountain, prior to the finding of mineral in rock in place in the general mass of the mountain on the Canestota lode-mining claim, then and in that event the Last Batch location is entitled to prevail over the Canestota location as to priority of discovery of mineral. And if you find from the evidence the location of the Last Batch in all respects to be prior to and superior to the Canestota location, and you further find that such location has a valid discovery of mineral within it, as herein defined, prior to the finding of mineral in the Canestota location, then and in that event the Canestota location is invalid and of no force or effect in so far as the said Canestota location conflicts with the Last Batch location."

Defendants made no claim that mineral had been discovered on the Last Batch at any point other than in the discovery shaft of that claim. Counsel for defendants contend that

a valid discovery of mineral cannot be shown at any place within the limits of the claim located other than the discovery shaft, unless the claim be relocated, and the second discovery made the basis of such relocation. On behalf of the plaintiff it is contended that defendants are foreclosed from having this question considered and determined, for the reason that, under instructions given at their request, the jury was directed that a discovery of mineral within the boundaries of the Last Batch at any point would render the location of that claim valid, if made prior to a discovery upon the Canestota.

Defendants offered to prove that a sample of ore claimed to have been taken from the dump of the Last Batch discovery shaft showed precious minerals in appreciable quantities, which offer was refused.

It appears from the record that plaintiff attempted to establish that the discovery shaft of the Last Batch had been "salted." Norman Estey, interested in a lease on the Canestota, employed one Anderson to watch this shaft. While so engaged, four persons, neither of whom is a party to this action, or in any manner interested in the subject-matter of the controversy, came to this shaft about midnight, and acted in a suspicious manner. Anderson did not see these parties do anything which would indicate that they did any salting, nor was there any evidence tending to connect them with the defendants. Counsel for the latter moved to strike out this evidence, which was refused. The court stated in its instructions that this evidence was admitted for the sole and only purpose of throwing light upon assays of samples claimed to have been taken from the Last Batch shaft.

PHELPS & PENDERY and PATTERSON, RICHARDSON & HAWKINS, for appellants.

T. A. DICKSON, for appellee.

GABBERT, J. The instruction requested on behalf of defendants and refused was to the effect that the discovery of mineral at any point other than in the discovery shaft will not avail or validate a location. According to the undisputed facts, the point of discovery and the discovery shaft upon each claim are one and the same, so that the important question (independent of the disclosure of a vein in the discovery shaft) which defendants raised by the instruction refused is, must a location of a lode-mining claim be based upon a specific vein?

In the opinion of the majority of the court, they are precluded from having this question considered and determined, for the reason that, under the instructions given at their request, the jury was, in effect, directed that the discovery of mineral within the boundaries of the Last Batch at any point would render the location of that claim valid, if made prior to a discovery upon the Canestota. If, in effect, the instructions given at the request of defendants are susceptible of this construction, then, unquestionably, they are precluded from having the question sought to be raised by the instruction requested and refused determined, for the obvious reason that, if instructions given at their request do not state the law correctly, they cannot complain of the refusal of the court to give an instruction which, though correct, is inconsistent with those given, or, in other words, states the law differently on a given point from those given at their instance. With the conclusion of the majority that the instructions given at the request of counsel for defendants state, in effect, that a discovery of mineral at any point within the boundaries of the Last Batch could be considered as a discovery which might validate that claim, the writer does not agree.

The instructions as given, and which appear in the statement, must be read and construed as a whole. From these it appears, in the judgment of the writer, that the jury was directed, in effect, that a discovery shaft must be sunk upon the

vein; that a notice must be posted at the point of discovery; that it must appear from the evidence that a valid discovery of a vein was made within the exterior boundaries of the Last Batch, as required by law (from which it must be understood that a vein was disclosed in the discovery shaft); and that, in order to entitle the defendants to recover, it must appear that the finding of mineral within the limits of their claim in the manner defined in the instructions (i. e. upon the vein which they claim to have located, and at the point designated "Discovery") must antedate the finding of mineral in the Canestota. As an additional reason why this construction should be given these instructions, it must be borne in mind that the defendants made no claim that mineral was discovered at any point on the Last Batch except in the discovery shaft. The conclusion of the majority precludes a consideration of the action of the trial court in refusing to give the instruction requested.

The fact that the Price shaft was only partially within the boundaries of the Canestota is immaterial. The simple question, so far as that location is concerned, was whether mineral had been discovered in that shaft, within the boundaries of the Canestota. If so, and it antedated a discovery of mineral in place on the Last Batch, then, under the theory upon which the cause was submitted to the jury, it validated the Canestota. As this was a theory which, in the opinion of the majority of the court, appears to have been adopted at the instance of counsel for defendants, whether or not it is correct we do not pretend to pass upon; and the conclusion that the discovery of mineral in the Price shaft might validate the Canestota location, if made before mineral was discovered on the Last Batch, is reached for the reason that the instructions of the court that it would be in harmony with those given at the instance of defendants in this respect.

In the opinion of the majority of the court, the evidence of the witness Anderson was admissible. Plaintiff claimed

that the shaft of the Last Batch had been "salted," and therefore any evidence tending to establish this claim was competent. Whether or not the parties who visited this shaft at the time mentioned by Anderson did so at the instance of the defendants was a matter for the jury to determine, especially in view of the fact that Anderson pointed out at least one of them in the court room, and the defendants did not place him upon the stand for the purpose of either contradicting the witness Anderson, or showing at whose instance or for what purpose they visited the shaft. Neither did they attempt to show that these parties did not visit the premises at their request. The writer does not believe that this evidence should have been admitted. The fact that the defendants did not see fit to attempt to show that these parties did not visit the shaft, or do the acts as detailed by Anderson, at their request, or did not call the witness pointed out by him in the court room, are not matters which should be taken into consideration in determining the admissibility of this testimony. Their failure to contradict it or explain it in any way does not affect their right to object to that which is immaterial and incompetent. There was no evidence whatever tending to show that these parties who visited the Last Batch shaft did so at the instance of the defendants, or were in any manner connected with them, or interested in the subject-matter of the controversy. In the absence of such testimony the statement of Anderson tended to cast suspicion upon the defendants, that they were guilty of salting the shaft of the Last Batch, by the suspicious action of parties with whom they had no connection, and who, so far as disclosed by the record, may have visited the property at the instance of the plaintiffs. This testimony, in the opinion of the writer, should have been excluded.

The evidence regarding the assay of a sample of ore claimed to have been taken from the dump of the Last Batch should have been admitted. Whether or not, as a matter of

fact, such sample was originally taken from the shaft, was a proper matter for argument before the jury, and for it to consider in determining what weight should be given to such evidence. For the error in excluding this evidence, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

FISSURE MINING CO. V. OLD SUSAN MINING CO.

(22 Utah 438; 63 Pac. 587. Supreme Court. Dec. 3, 1900.)

Where there is evidence to support the findings, the weight of such evidence being within the province of the trial court, its determination thereof will not be disturbed on appeal unless manifestly erroneous.

¹**Work on Group.** Where the testimony tends to show that respondent's mining claims were consolidated or worked for development purposes, that work on the tunnel and shafts was done to apply on the respective claims, that respondent had an interest in all of these claims, and that the development work was a benefit to all the claims, the testimony is sufficient to sustain the finding that the work done in the tunnel and shafts was beneficial to respondent's claims, under the provisions of Section 2324, Rev. St. U. S.

²**Six months' failure to work forfeits Blind Lodes.** The provisions of Section 2323, Rev. St. U. S., and the privilege granted thereby, apply to one who locates a tunnel for discovery purposes as well as for development purposes; but failure to prosecute work on such a tunnel for six months works an abandonment of the right to all undiscovered veins on the line of such tunnel, and the owner of such tunnel is not entitled to a blind vein subsequently discovered, but only to the bore of the tunnel, and a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes.

Scope of cross-examination. A party has a right upon cross-examination to draw out anything which would tend to contradict, weaken, modify, or explain the evidence given by the witness on his direct examination, or any inference that may result from it tending to support in any degree the opposite side of the case.

³**The construction of a notice for a mining location should be liberal and not technical, and the sufficiency of a notice with reference to natural monuments or permanent objects is a question of fact.**

(Syllabus by the Court.)

¹*Book v. Justice Co.* 17 M. R. 617. *Eberle v. Carmichael*, 8 N. M. 169; 42 Pac. 95.

²"Nor can the owner of such a tunnel preserve his rights to undiscovered veins by lazy and perfunctory work." *Enterprise Co. v. Rico Aspen Co.*, 66 Fed. 206.

³*Farmington Co. v. Rhymney Co.* 20 Utah 363; 58 Pac. 832. *Morrison v. Regan*, 67 Pac. 955; 22 M. R. —; *McCann v. McMillan*, 21 M. R. 6; *Wells v. Davis*, 21 M. R. 1.

Appeal from District Court, Fifth District. E. V. HIGGINS, Judge.

Action by the Fissure Mining Company against the Old Susan Mining Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. MOYLE and D. H. WELLS, for appellant.

E. D. R. THOMPSON, for respondent.

MINER, J. This action was brought to determine the adverse right to certain mining claims by the appellant against the respondent, and to obtain a patent, under section 2326, Rev. St. U. S. The appellant claims the Fissure and Contrary lodes, which were located in June and July, 1896, respectively. The respondent claims the General Sheridan tunnel site, located in 1892 on what is called the "Calumet Claim," and which, in its course, crosses the Franklin, Calumet, and Clift claims. Respondent also claims the Franklin lode claim, located in 1893, the Calumet, located in 1899, and the Calumet No. 1, located in 1899; the last being a blind vein, claimed under the General Sheridan tunnel site, which was discovered during the prosecution of the work in said tunnel, and is claimed by the respondent under section 2323, Rev. St. U. S. A conflict is alleged to exist between the Contrary and Fissure lodes, claimed by the appellant, and the Franklin and Calumet lodes and the General Sheridan tunnel, claimed by respondent. The former overlap the latter claims in part. All of the respondent's claims were located by Dennis Sullivan, from whom title was derived. The court found, among other facts, that Dennis Sullivan, respondent's grantor, performed the annual assessment work for the Franklin lode for the year 1895 by work performed in the General Sheridan tunnel, and that the work so per-

formed was worth more than \$100, and that since the year 1894 the work on the Franklin lode has been done each year through the General Sheridan tunnel, or through the shafts or drifts in the Clift lode, which adjoins the Franklin; that the course of the tunnel is across and through the Franklin and Clift lodes, which belong to the respondent, and which adjoin each other, and that any work done in said tunnel or shafts materially tended to the development of the Franklin and Clift lodes; that all the work done on the tunnel and the Franklin claim since the year 1895 was done for the purpose and intention of having it apply upon the annual assessment work for the Franklin and Clift lodes, and not for the purpose or intent to use said tunnel as a means for the discovery of blind veins or ledges, but that the work done in said tunnel was not performed with such diligence as would entitle the owner to any blind veins discovered therein, under section 2323, Rev. St. U. S., and that the work on said tunnel has not been abandoned; that in July, 1899, the defendant located a blind vein or ledge called the "Calumet No. 1," discovered in said tunnel. As conclusions of law the court found that the work on the said tunnel was not prosecuted with such diligence so as to entitle the defendant to the blind vein or ledge found under the tunnel; that the respondent is the owner and entitled to the possession of the General Sheridan tunnel site, and to 50 feet each side of the mouth thereof, extending in front 100 feet for dumping purposes; that the bore of the tunnel had not been abandoned; that the respondent was the owner and entitled to the possession of the Franklin lode mining claim, together with all the conflicting area, and that the appellant was not entitled to any part of the Fissure lode mining claim where it conflicts or overlaps the Franklin lode, but was entitled to the balance of said claim; and that the appellant was the owner and entitled to the possession of the Contrary lode mining claim, except so far as it was subject to the ownership

by respondent by reason of the location of the General Sheridan tunnel.

The appellant contends that the testimony does not support or sustain the findings. We have examined the testimony with reference to the objections made, and, while we find it conflicting, yet it is clear to our minds that there was testimony given upon which the facts and findings could (properly) be predicated. Under such circumstances this court will not review the facts or question the findings. Where there is evidence to support the findings, the weight of such evidence being within the province of the trial court, its determination thereof will not be disturbed on appeal unless manifestly erroneous. *Strickley v. Hill* (Utah), 62 Pac. 893; *McCornick v. Mangum* (Utah), 57 Pac. 428; *Dooley Block v. Salt Lake Rapid-Transit Co.*, 9 Utah, 31, 33 Pac. 229.

The appellant contends that the work on the tunnel and the shafts of the Clift claim should not be credited as work on the Franklin and Clift claims; that the tunnel was located as a tunnel site, under section 2323, Rev. St. U. S., and not for the development of other claims, under section 2324. The testimony tends to show that these claims were consolidated or worked for development purposes, and that work on the tunnel and shafts was done to apply on the respective claims; that the respondent had an interest in all of these claims, and that the development work was a benefit to all the claims. Under such circumstances the testimony sustains the finding that the work done in the tunnel and shafts was beneficial to respondent's claims. Section 2324, Rev. St. U. S.; *Wilson v. Mining Co.*, 19 Utah, 67, 56 Pac. 300. It is true, as claimed by the appellant, that there is some discrepancy in respondent's testimony tending to show that the work on the tunnel was not prosecuted with reasonable diligence for a period of six months. Under section 2323, a failure to prosecute the work on the tunnel for six months is

considered an abandonment of the right to all undiscovered veins on the line of such tunnel. Because of this the court properly found that the respondent was not entitled to the blind vein discovered under the tunnel, called the "Calumet No. 1," and was only entitled to the bore of the General Sheridan tunnel site, and to a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes. The balance of the claim on which the mouth of the tunnel is located was awarded to the appellant. We are of the opinion that this finding is sustained by the testimony. The owner of mining claims may develop them by means of a tunnel. The privilege granted by section 2323 applies to one who locates a tunnel for discovery purposes as well as for development purposes.

Several objections are urged on account of the improper admission or rejection of testimony. We have given these questions attention, but do not find that any reversible error was committed by the court, although greater latitude could properly have been given on the cross-examination of one of the witnesses. A party has a right upon cross-examination to draw out anything which would tend to contradict, weaken, modify, or explain the evidence given by the witness on his direct examination, or any inference that may result from it tending in any degree to support the opposite side of the case.

It is next claimed by the appellant that the notice of location of the Franklin and Clift claims was indefinite and uncertain as to locality, and should not have been received in evidence. It appears that the Clift claim was located in 1888, and was a relocation of the Old Susan ledge. It was where the Old Susan mine was located. The testimony shows that the Old Susan had been a shipper of ore and a dividend payer for years. The notice recites, "This claim shall be known as the Clift mining claim, and was known as the Susan ledge, about 2 miles south of Diamond City, Tintic

mining district, Utah." The Franklin claim was located in 1893, about $1\frac{1}{2}$ miles south of Diamond City, on the west side of the Clift claim. One was located adjoining the other. The testimony shows that Diamond City and the Old Susan mining ledge had a notoriety in that vicinity, and were well known. Work had been performed on these mines to keep up the assessment work since their location. Taking all the facts into consideration, we are of the opinion that the notices were sufficient. The construction of a notice for a mining location should be liberal, and not technical, and the sufficiency of a notice with reference to natural monuments or permanent objects is a question of fact. *Wilson v. Mining Co.*, 19 Utah, 66, 56 Pac. 300; *Farmington M. Co. v. Rhymney Co.* (Utah), 58 Pac. 832.

Other questions are presented, but they do not merit further discussion. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

EUREKA HILL MINING CO. v. CITY OF EUREKA.

(22 Utah 447; 63 Pac. 654. Supreme Court. Dec. 6, 1900.)

Presumption of valid judgment. The intendments of the law are that the judgments of courts of general jurisdiction are valid, and that he who attacks them must conclusively show their invalidity.

Presumption of regular taxation. Under the authority of Section 4, Art. 13, Const., and Sections 2504, 2566-2569, Rev. St. 1898, it is the duty of the county assessor of each county in which an incorporated city is situated to assess, in accordance with the provisions of Section 2688, Rev. St. 1898, the taxable property in such city, and deliver a copy of that part of his assessment roll containing the assessment of such city property to the city auditor. Thereafter such assessment roll may be used by the city authorities, as provided in said section, in levying taxes for general municipal purposes; and when the acts of the assessor are in due form, and the tax regularly levied by the city authorities, and there is nothing on the face of the official proceedings to show that any officer acted illegally or superseded his authority, the acts of the assessor and city authorities are presumed to be valid until the contrary is shown.

¹Shaft taking ore under and also beyond town limits. The net proceeds of a mine are taxable at the place where the ores are taken to the surface through the main workings, and, being personal property, should be taxed as other personalty.

(Syllabus by the Court.)

¹Construction of Utah net output tax. *Mercur Co. v. Spry*, 16 Utah 222; 52 Pac. 382. Montana Act. *Montana Co. v. Livingston*, 21 Mont. 59; 52 Pac. 780.

A lease of coal lands reserving surface, provided that the lessor should pay the taxes on the lands demised: *Held*, that the lessor was liable for the tax on coal as well as surface. *Miles v. Delaware Co.*, 140 Pa. 623; 21 Atl. 427.

Taxes may be the subject of an apportionment and off-set between the lessor and lessee. *Hecksher v. Sheaffer*, (Pa.) 4 Atl. 740.

In Arizona, mining claims not patented not liable to tax. *Waller v. Hughes*, 2 Ariz. 114; 11 Pac. 122.

Mine, and improvements not on the mine sold together, held invalid. *Knox v. Higby*, 76 Cal. 264; 18 Pac. 381.

A lessor's covenant to pay all taxes is not affected by a subsequent decision declaring that the lease amounted to a sale of the coal. *Woodward v. Delaware Co.* 121 Pa. 344; 15 Atl. 622.

Appeal from District Court, Juab County. E. V. HIGGINS, Judge.

Action by the Eureka Hill Mining Company against the city of Eureka. Judgment for defendant, and plaintiff appeals. Affirmed.

BENNETT, HARKNESS, HOWAT, SUTHERLAND & VAN COTT, for appellant.

N. A. ROBERTSON, for respondent.

BASKIN, J. This is an action in which the Eureka Hill Mining Company, a corporation, sought to recover from the city of Eureka, a municipal corporation, the sum of \$615.17, levied and collected by said city as a tax on the net annual proceeds of said company's mine, and paid by said company under protest. It appears from an agreed statement made by the parties, and from the findings of fact by

A placer survey laid out into lots and built on as parcel of the town can no longer claim exemption from taxation as a mining claim. *Dyke v. Whyte*, 17 Colo. 296; 29 Pac. 128.

Mining lease covenants to pay taxes do not include sewer and paving assessments. *Pettibone v. Smith*, 150 Pa. 118; 24 Atl. 693.

Payment of taxes does not prove title. *Lakin v. Dolly*, 53 Fed. 333.

Where the assets are all assessed the stock cannot be taxed. *Hyland v. Brazil Co.*, 128 Ind. 335; 26 N. E. 672.

Severed coal beds may be assessed separately. *Cons. Coal Co. v. Baker*, 135 Ill. 545; 26 N. E. 651. *Stuart v. Com.* 15 Ky. L. R. 513; 23 S. W. 367.

Reserved right to mine coal may be taxed as realty although no proof exists of coal. *Major, In re*. 134 Ill. 19; 24 N. E. 973.

Several taxation of surface and mineral rights. *Hutchinson v. Kline*, 199 Pa. 564; 49 Atl. 312.

Railroad lands are taxable pending investigation as to whether or not mineral land. *Myers v. N. P. Ry.* 83 Fed. 358.

Sale of patented claim without number of survey lot in Colorado, held void. *Hammond v. Nix*, 104 Fed. 689.

the trial court, that the mining company during the years 1896 and 1897 owned five mining claims situated in the county of Juab, Utah, and worked the same as one mine, known as the Eureka Hill mine; that about 67 4-10 per cent of the area of said mining claims lies within, and about 32 6-10 per cent thereof lies outside of, the boundaries of said city; that the main shaft, the compressor, hoisting works, and ore veins of said mine are situated within the limits of said city; that a portion of the mill used by said company in operating said mine is within, and a part outside of, the city limits; that in that portion of the mill within the city the office of the mining company in said city is situated, but that the main office of said company is in Salt Lake City, and that city is designated in the articles of incorporation of said company as its principal place of business; that all of the ore extracted from said mine was raised through the main shaft, and mixed together at the hoisting works within the city of Eureka, and there sorted into two grades,—milling and shipping ore; that the shipping ores were from thence shipped to markets outside of the city and sold, and the milling ores were shipped to the company's mill, and there reduced to a marketable article, and thence shipped out of the city and sold; that of the ore so extracted and sold for the year ending June 1, 1897, about 45 per cent, in volume, came from ground lying within the city, and about 55 per cent from ground lying without the city; that, in value, about 70 per cent of the ore was extracted from ground lying within, and about 30 per cent from ground lying without, the city limits; that the mining company kept no separate account of the net proceeds derived from ore extracted from the mine within the city, or of the net proceeds of ore extracted from the mine outside of the city, but kept one account only of the net proceeds derived from the whole of the ore extracted, shipped, and sold; that the mining company made and returned to the assessor of Juab county a statement showing the net pro-

ceeds of its mine for the year ending June 1, 1897, to be \$184,477; that said assessor in due time, during the year 1897, delivered to the city recorder of said city a copy of that portion of the county assessment roll containing the assessment of the property in said city, including the net proceeds of said company's mine so returned by the assessor; that the city regularly levied a tax of five mills on the dollar on the amount of the proceeds of the company's mine set out in the copy of that part of the county assessment roll so delivered by said assessor to the city auditor; that the tax levied on said net proceeds amounted to \$922.38, and of this sum the company paid to the city \$307.45, but denied the right of the city to collect the balance, \$614.92; that afterwards the city advertised the company's property for sale to satisfy said balance, and the company, to avoid a seizure and sale of its property, paid the same under protest. The city did not request, and the company did not make to the city, any return of either the amount of ore extracted within the city, or the net proceeds thereof, or any estimate of the same. Said levy was based solely on the net proceeds of the company's mine as returned to the city auditor by the county assessor. In addition to the foregoing facts the trial court found the following facts:

"That there is no method of ascertaining what proportion of such shipping ores and such milling ores originally came from within or without the city limits, and that all ores extracted from the mine were mixed at the said hoisting works after raising from the mine; that the books of plaintiff could have been so kept that the amount and proceeds of ores extracted from within the city limits would be capable of definite ascertainment, but were not so kept, nor was there any attempt on the part of the plaintiff to separate the ores taken from within and without the city limits, or the net proceeds derived therefrom."

As a conclusion of law, the trial court found:

"That the net proceeds of plaintiff's mine within and without the

city of Eureka are taxable at the place where they are taken to the surface through the main shaft of the plaintiff, which is within the limits of defendant city,"

And dismissed plaintiff's complaint and rendered a judgment for costs against the plaintiff.

Numerous assignments of error were made by the appellant, but the only one relied upon by its counsel in their brief is that the evidence is insufficient to support the judgment. The contention of appellant on this point is that the net annual proceeds of the mine, derived from ores extracted therefrom, outside of the boundaries of the city, were not subject to taxation by the city, and that the conclusion of law found from the facts by the court below is erroneous. Section 4, art. 13, Const., provides that "the annual proceeds of all mines and mining claims, shall be taxed as provided by law." The revenue act of 1896, in pursuance of that provision of the constitution, provides that "the net annual proceeds of all mines and mining claims shall be taxed as other property" (section 2504, Rev. St.), and that "every owner of mines and mining claims engaged in working the same, must, between the first and tenth of April, in each year, make a verified statement showing the net annual proceeds thereof and deliver the same to the assessor of the county in which the mine or mines are situated." Sections 2566-2569, Rev. St. From the requirement that such statement should be delivered to the assessor of the county in which the mine or mines are located, in connection with section 2688 of the Revised Statutes, which provides that "on or before the first Monday of June in each year the county assessor of each county in which there is situated any incorporated city or town, shall deliver to the clerk or recorder of each city and to the clerk or president of the board of trustees of each town, a statement showing the aggregate valuation of all the taxable property in such city or town; and shall deliver to the recorder of each city of the third class and to the clerk of each town a copy

of that part of the assessment roll containing the assessment of property in each such city or town, respectively, which shall be used as the basis for general municipal taxes therein until the next county assessment is made," it is evident that the legislature intended that the counties, cities, and towns within the limits of which mines are situated should respectively levy, collect, and appropriate to their respective use the tax on the net proceeds authorized by the revenue act. This being so, the jurisdictions in which such proceeds may be taxed are not the places where the ores are brought to the surface; for in some instances the ores may be brought to the surface through tunnels and shafts at points entirely outside of the jurisdiction, in which are situated all of the surface ground of mines, and the apexes of all the veins or deposits of ore embraced thereby and belonging to the same. The right to follow a vein or deposit of ore on its downward course, outside of the side lines of the surface boundaries, springs from and is incidental to the ownership of the apex and the surface ground covering the same. Therefore when the net proceeds of a mine are derived from veins or deposits of ore, the apexes of which and the surface ground of the mining claim are within the boundaries of a county, city, or town, we have no doubt that under the revenue act such proceeds are taxable therein, notwithstanding a portion or even all the ore may have been extracted from the mine beneath the surface on the dip, outside of the boundaries of the county, city, or town. The situs of such a mine, for the purposes of taxation, is not determined by the place at which the ores are brought to the surface, but by the place in which the apexes of the veins or deposits of ore, and the surface covering their apexes, are situated. The burden of showing the invalidity of that portion of tax sought to be recovered is upon the mining company. This, the city's counsel contend, has not been done. The record fails to show that any part of the ores from which the net annual proceeds of the mine

were derived were extracted from any of its mining claims situated outside of the city limits. From aught that appears from the facts, in regard to which there is no contention, all of the ores may have been extracted from veins or deposits of ore, the apexes of which are wholly within mining claims belonging to the company, the surface boundary lines of which are wholly within the city limits. It is not shown by the facts that any of the ores were extracted on the strike of any vein or ore deposit outside of the city limits, but, from aught that appears, the extraction of ores outside of such limits may have been done beneath the surface, on the dip of a vein or deposit of ore having its apexes within the city limits. The acts of public officers, regularly performed within the scope of their authority, are presumed to be valid until the contrary is shown. In this case it was the duty of the assessor, under section 2688, Rev. St., to assess the taxable property in said city, and deliver a copy of that part of his assessment roll containing the assessment of the property in the city to the city auditor. This was done by the assessor in due form, and, upon the copy of the assessment roll so returned, the city authorities, as provided in said section, regularly levied the tax sought to be recovered. There is nothing on the face of their official proceedings showing that the officers acted illegally or superseded their authority. The intendment of law are that the judgments of courts of general jurisdiction are valid, and that he who attacks them must conclusively show their invalidity. The appellant has failed to make such showing in this case, and as the uncontradicted facts are before us, and fail to show the invalidity of the tax, the judgment should not be reversed.

Counsel did not cite any case in point on the main question in the case, nor have we been able to find any. The case of *Gilchrist's Appeal*, 109 Pa. St. 600, cited by appellant's counsel as in point, has no relevancy, as the facts in that case were different from those in this case. In that case the coal

lands taxed were wholly outside of the boundaries of the city, and it does not appear that the owners of coal veins in the state of Pennsylvania are entitled to the lateral rights which the owners of mining claims in this state enjoy. The facts in this case show that it is probable that in some instances a very small portion of the surface ground of the apex of a vein or ore deposit of a mining claim may be in one taxation district, and the balance of the same on the course of the claim and vein or deposit in a different one. And in some instances the ores may be brought to the surface on both sides of the dividing lines of taxation districts, and some of these lines may cross the veins or deposits of ore at a right angle to their strike, and others may, upon the apexes of such veins or deposits, pass longitudinally over and through them. As the revenue act does not require the owners of mines in such instances to make statements of the proceeds of their mines derived from ores taken from different taxing districts, perplexing complications are liable to occur. We express no opinion as to how taxes should be levied in such instances, as the facts in this case do not present any such instance, but call attention to the matter simply to emphasize the necessity of amending the revenue act so as to meet such contingencies. It is ordered that the judgment of the lower court be affirmed, and that the appellant pay the costs.

BARTCH, C. J., and MINER, J. We concur in the affirmation of the judgment, but dissent from the holding contained in the opinion with reference to the place where the net proceeds of the mine are taxable. We agree with the trial court that the net proceeds of the appellant's mine, both within and without the city of Eureka, are taxable at the place where the ores are taken to the surface through the main shaft of appellant's mine, which is within the limits of the respondent city. The net proceeds, being personal property, should be taxed in the city of Eureka, and as other personal property.

MANUFACTURERS' GAS CO. v. INDIANA NAT. GAS CO. 139

MANUFACTURERS' GAS & OIL CO. ET AL. v. INDIANA NATURAL
GAS & OIL CO.

(155 Indiana 566; 58 N. E. 851. Supreme Court. December 11, 1900.)

¹Special injury to plaintiff must show in action under the Gas Pressure Act. A complaint to enjoin defendant from transporting natural gas through pipes at a pressure exceeding 300 pounds per square inch in violation of the provisions of the act of 1891, is insufficient where it is not shown that plaintiffs sustain any special injury peculiar to themselves by reason of the violation of the act aside from, and independent of, the general injury to the public.

Appeal from Circuit Court, Grant County. H. J. PAULUS,
Judge.

Suit by the Manufacturers' Gas & Oil Company and others against the Indiana Natural Gas & Oil Company for an injunction. From an order sustaining a demurrer to the complaint, plaintiff's appeal. Affirmed.

ROLLIN WARNER, A. W. BRADY and WM. A. KETCHAM,
for appellants.

W. O. JOHNSON, FOSTER DAVIS, J. C. BLACKLIDGE, C. C.
SHIRLY, C. WOLF and M. WINFIELD, for appellee.

DOWLING, C. J. The object of this suit was to enjoin the appellee from transporting natural gas through pipes at a

¹Reaffirmed, *Manufacturers' Co. v. Indiana Co.* 21 M. R. 194.

The owner cannot be enjoined from using a force pump though it may draw oil from adjoining land of his neighbor. *Jones v. Forest Oil Co.* 20 M. R. 350.

pressure exceeding 300 pounds per square inch, in violation of the provisions of the act of March 4, 1891 (Acts 1891, p. 89; Burns' Rev. St. 1894, §§ 7507-7509). A demurrer to the complaint was sustained, and this ruling is assigned for error.

The principal averments of the complaint are that the appellants (with the exception of the Manufacturers' Gas & Oil Company) are manufacturers; that they have invested large sums of money in their factories and business, which are situated in what is known as the "Gas Belt of Indiana;" that they have added largely to the taxable property, wealth, and population of the state; that in making their investments they relied upon the continuance of the supply of the natural gas contained in the common reservoir described in the complaint. It is charged that the appellee is transporting from the gas field natural gas, through pipes, at a pressure exceeding 300 pounds to the square inch, in contravention of the statute, and that such wrongful act is destructive of the common source of supply, and an illegal invasion of the rights of the appellants. The allegation as to the Manufacturers' Gas & Oil Company is that it is the owner of gas wells in the field in which the appellee is engaged in piping gas, and that it is furnishing gas to certain of the other appellants. It is not averred that the property or gas wells of the appellants are near to the pipe lines of the appellee, or that the lives of the appellants, or of their servants and employes, or their property, are exposed to danger by reason of the excessive pressure of the gas in the appellee's pipe lines.

So much of the act of 1891 as relates to this controversy is in these words:

"Be it enacted," etc., "that any person, or persons, firm, company, or corporation, engaged in drilling for, piping, transporting, using or selling natural gas, may transport or conduct the same through

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sound wrought or cast iron casings and pipes, tested to at least four hundred pounds pressure to the square inch: Provided, such gas shall not be transported through pipes at a pressure exceeding three hundred pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the wells.

"Sec. 2. It is hereby declared to be unlawful for any person, or persons, firm, company, or corporation, to use any device for pumping, or any other artificial process or appliance, for the purpose, or that shall have the effect of, increasing the natural flow of natural gas from any well, or of increasing or maintaining the flow of natural gas through the pipes used for conveying and transporting the same.

"Sec. 3. Any person, or persons, firm, company, or corporation, violating any of the provisions of this act shall be fined in any sum not less than one thousand dollars, or more than ten thousand dollars, and may be enjoined from conveying and transporting natural gas through pipes, otherwise than in this act provided."

The constitutionality of this statute was upheld by this court in *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76. It was there decided that no provision of the state constitution was violated by the act, and that it was not antagonistic to the fourteenth amendment of the federal constitution, nor to any provision of that instrument protecting vested or contract rights.

The law was sustained upon the ground that natural gas is an inflammable, explosive, and dangerous substance, and that the enactment of the statute in question was a reasonable exercise of the police power of the state for the protection of the persons and property of its inhabitants. The injuries against which the statute attempts to provide are those resulting from the peculiar and dangerous characteristics of the gas. In the case before us it is not alleged that any injury from this cause is threatened or apprehended. Neither is it shown that the appellants sustain, or will sustain, any special injury different from that which may be inflicted upon the public generally by reason of the violation of the act of 1891 by the appellee. In other words, the complaint

fails to show a special injury to the appellants, peculiar to themselves, aside from and independent of the general injury to the public. High, Inj. § 522, and cases cited in note 2.

For these reasons the complaint in this action must be held insufficient, and the court below committed no error in sustaining a demurrer thereto.

Judgment affirmed.

WILLIAM HEXTER ET AL. V. PARMENAS W. PEARCE ET AL.

(L. R. 1 Chancery (1900) 341. Supreme Court of Judicature.
December 14, 1900.)

¹Lease of undivided half. The Court will decree specific performance of an agreement for a lease of an undivided moiety of mineral property.

²The whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted and is not bound to take damages instead.

This was an action by the plaintiffs for the specific performance of an agreement for the grant of a lease of the clay

¹Specific performance cannot be enforced for an agreement to give plaintiff an "interest" not specifying what, for securing him a good mine. *Berry v. Woodburn*, 107 Cal. 504; 40 Pac. 802.

Parol sale of undivided interest enforced. *Costa v. Silva*, 20 M. R. 330.

Not enforced upon an oral contract without possession. *Mackey v. Magnon*, 12 Colo. App. 137; 54 Pac. 907.

²Specific performance of contract to furnish clear water in place of water polluted by ore washing. *Grubb v. Starkey*, 90 Va. 831; 20 S. E. 784.

Equity will not compel specific performance to build railroad. *Ewing v. Litchfield*, 91 Va. 575; 22 S. E. 362.

Not enforced on an option—or where it requires detailed improvements, etc. *Stanton v. Singleton*, 126 Cal. 657; 59 Pac. 146.

Case holding sufficient authority to contract proved, to warrant decree on cross-complaint, against co-defendants. *Burris v. Anderson*, 27 Colo. 506; 62 Pac. 362.

Not granted on loose conversations. *Hibbert v. Mackinnon*, 79 Wis. 673; 49 N. W. 21.

Not defeated by erroneous representations on minor points. *Wilson v. McLaughlin*, 11 Colo. 465; 18 Pac. 739.

Contract must be fair, equitable and mutually binding. Compensation in case where specific performance denied. *Rider v. Gray*, 10 Md. 282; 69 Am. Dec. 135.

Necessary allegations of bill for specific performance of contract for mining claims (possessory). What is not part performance under statute of frauds. *Ducie v. Ford*, 8 Mont. 233; 19 Pac. 414.

and other minerals in or upon an undivided moiety of and in certain freehold lands with liberty to work, dig, and sell the same.

The facts, so far as material for the purposes of this report, were as follows:—

The defendant, Parmenas William Pearce, was the owner in fee of an undivided moiety of certain fields forming part of the Teignbridge estate, in the county of Devon, subject to an annuity charged thereon in favour of his wife, the defendant, Mary Elizabeth Pearce.

By an indenture dated April 30, 1894, the defendant P. W. Pearce, and the co-owners of the other undivided moiety of the said fields, granted to the defendant William Henry Whiteway Wilkinson (trading as Whiteway & Co.) a license for the term of five years from September 29, 1893, to mine,

Specific performance of lease will not be enforced against prior lessees or prior equities. *Grummett v. Gingrass*, 77 Mich. 369; 43 N. W. 999.

Improvements were put on ground by party dealing with the equitable owner; the equity, a parol contract with the legal owner, being disputed. Part of the purchase price was paid to the legal owner; held still within the Statute of Frauds. *Boulder Valley Co. v. Farnham*, 12 Mont. 1; 29 Pac. 277.

When dangerous mining or litigation is liable to ensue if specific performance allowed, compensation in damages may be awarded instead. *Miles v. Lover F. Co.* 125 N. Y. 294; 26 N. E. 261.

Where a vendee obtained decree for specific performance upon payment of purchase money within a certain time on which payment he defaulted, the decree was amended to declare title in the vendor. *Carson M. Co. v. Hill*, 7 Colo. App. 141; 42 Pac. 678.

A contract to convey an undivided interest in a lode to which defendant has no title is without consideration and cannot be specifically enforced. *Traphaagen v. Kirk*. — Mont. —; 77 Pac. 53.

Specific performance will not be granted when time was made the essence of the contract and there has been delay. *Garcin v. Penn. Co.* 186 Mass. 405; 71 N. E. 793.

Specific performance of a contract to convey oil lands intended to be prospected refused because requiring decree for personal services and labor. *Los Angeles Co. v. Occidental Co.* 144 Cal. 528; 78 Pac. 25.

dig, raise, and remove in and from the said fields (including, *inter alia*, the fields comprised in the agreement next herein-after mentioned) merchantable potter's clay in the manner and quantities and at the rent and royalties therein specified.

By an agreement dated May 11, 1896, and made between the defendants P. W. Pearce and Mary E. Pearce of the one part, and the plaintiffs William Hexter and William Humpherson of the other part, after reciting the title of the defendant P. W. Pearce to a moiety of all or some of the fields above referred to and specifying them by name, and that the defendant Mary E. Pearce had certain interests or rights therein, and that the right to dig and sell clay or other minerals in the said lands was then vested in Whiteway & Co., under the license or lease above mentioned, it was thereby agreed:

"That upon the expiration of the said lease to Whiteway & Co. on or about September 29, 1898, or at such other time as it shall legally expire, the said P. W. Pearce shall grant unto the said W. Hexter and W. Humpherson a full and proper lease to work, dig, and sell the clay or other minerals in and upon the said moiety of the lands to which the said P. W. Pearce has a just and legal right, such lease to be upon the same terms and with the same covenants, so far as they may be properly applicable, as are now contained in the lease hereinbefore mentioned, at present held by Whiteway & Co.; and the said Mary E. Pearce hereby agrees to execute any document that may be required to enable the said lease to be granted to the said W. Hexter and W. Humpherson as above described; and the said W. Hexter and W. Humpherson hereby agree to accept the lease as before described for the term of seven, fourteen, or twenty-one years, at their option, on the aforesaid terms and conditions."

By an indenture dated March 23, 1898, the defendant P. W. Pearce and the then co-owners of the other undivided moiety of the lands comprised in the lease or license of April 30, 1894, above mentioned, granted a lease or license to the defendant W. H. Whiteway Wilkinson, to mine, dig, raise, and remove in and from the entirety of such lands

merchantable potter's clay for a term of five years from September 29, 1898, subject to the rent, royalties, and covenants therein contained, and upon terms and conditions as to quantity and otherwise closely corresponding to those contained in the license of April 30, 1894. This second license was granted by the defendant P. W. Pearce without the consent of the plaintiffs, and the defendant W. H. W. Wilkinson knew of the existence of some agreement between the plaintiffs and his co-defendants relating to minerals under the said lands, but he was not aware of its contents.

Subsequently, the plaintiffs insisted on their right to have the contract of May 11, 1896, specifically performed, and, in consequence of the refusal of the defendants P. W. Pearce and Mary E. Pearce to grant any lease in pursuance of the contract, the present action was commenced.

The plaintiffs claimed, first, specific performance of the agreement of May 11, 1896; secondly, a declaration that any fresh lease of the clay and minerals granted to the defendant W. H. W. Wilkinson by his co-defendants was void as against the plaintiffs, and delivery up for cancellation of any such lease; and, thirdly, an account of the clay and minerals raised by the defendant W. H. W. Wilkinson since September 29, 1898, and payment of one moiety of the value thereof.

The evidence showed that it was practicable to work the clay which was left by two independent persons at different places within the area.

WARMINGTON, Q. C., and BADCOCK, Q. C., for plaintiffs.

There is no authority exactly in point, but we submit that, unless the difficulties in working these mines under the lease which we ask for are insuperable, this contract ought to be specifically enforced. The evidence does not show that the working of this mine by the plaintiffs and the lessees of the other undivided moiety is impracticable.

[FARWELL, J., referred to *Porter v. Lopes*, (1877) 7 Ch. D. 358, where Sir George Jessel, M. R., appointed a receiver in a partition action on the ground of inconvenience.]

The defense of inconvenience by itself is not enough. In *Burrow v. Scammell* (1881) 19 Ch. D. 175, which is to some extent an authority in favor of our contention, specific performance as to a moiety was enforced against the defendant, who had contracted to sell the whole of a house, and who, as was subsequently discovered, was only a tenant in common of an undivided moiety of it. There can be no more inconvenience in the present case than in that. It is quite practicable for these tenants in common to work the mine together, and it must be assumed that they or their lessees will act reasonably in the event of this agreement being specifically enforced.

[They also referred to Seton on Judgments, 5th ed. Vol. 1, p. 659, and to Fry on Specific Performance, 3rd ed. p. 566.]

VERNON SMITH, Q. C., and WARD COLDRIDGE, for the defendants Pearce.

The plaintiffs are not entitled to specific performance for two reasons: First, because this agreement is too uncertain, and next because it relates to an undivided moiety of a mine. We rely upon the opinion expressed by Knight Bruce, L. J., in *Price v. Griffith*, 1 D. M. & G. 80, where he seems to doubt whether an agreement to grant a lease of an undivided moiety of a mine will be specifically enforced. That case, we submit, cannot be reconciled with *Burrow v. Scammell*, 19 Ch. D. 175. Possibly, if this were a contract for the sale of the moiety, specific performance might be decreed, but a lease does not confer the same right to deal with the minerals as a conveyance in fee would. and we say that it would not be

practicable or possible for the plaintiffs, to work the minerals contemporaneously with the present lessee.

The proper remedy in this case is, we submit, damages, and not specific performance. The grant of a lease to the plaintiffs would probably give rise to further litigation.

T. L. WILKINSON, for the defendant Wilkinson. It will not be practicable for two independent lessees to work these minerals at the same time. I submit that my client's lease is a good lease, although I admit that if the plaintiffs get specific performance of this contract, my client may have to pay a proportionate share of the royalties to them on the principle of *Job v. Potton*, (1875) L. R. 20 Eq. 84.

WARMINGTON, Q. C., in reply.

FARWELL, J. After deciding that the agreement of May 11, 1896, was not too uncertain to be enforced, continued as follows:—Then it was said there ought not to be a judgment for specific performance, but only for damages. As regards that point, I felt some difficulty at first, but I have been convinced by the argument I have heard that I ought to grant specific performance in this action. I have now had the advantage, since the matter was discussed in opening, of hearing the evidence in the case, and I have seen the witnesses; and it is sufficient for me to say that I find as a fact that there is a substantial amount left of the merchantable clay, and that it is practicable to work the clay which is so left, as in fact it has been worked in times past by two independent persons at different places within the area. That being so, there is nothing special in the circumstances, and the case raises the point neatly whether specific performance ought ever to be granted in the case of a contract relating to an undivided moiety of mineral property, and I am asked to lay down a general rule that the court cannot grant specific per-

formance of such a contract. No authority has been cited to me for the existence for such a rule, unless I could read the dictum—because I do not think it comes to more than that—of Knight Bruce, L. J., in *Price v. Griffith*, 1 D. M. & G. 80, as sufficient. That case was really decided on another ground, as Bacon V.-C. pointed out in *Burrow v. Scammell*, 19 Ch. D. 175, namely, that the agreement was void for uncertainty. But the Lord Justice does say this (1 D. M. & G. 84): “If he intended to contract at all, he intended to contract for a lease of the whole colliery. Cases may be conceived where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery.” In a sense, with great deference to the Lord Justice, that is a truism; but the meaning, I think, is that in that case the intention of the lessor was to grant a lease of the entirety and nothing else. There would have been a certain hardship in compelling him to grant a lease of a moiety only when he did not intend it, having regard to the fact that it was a lease of mineral property. I think that is all the Lord Justice meant. This case is different in the material point that here there is a clear intention to grant a lease of the moiety. As far as authority goes, the case of *Burrow v. Scammell*, *supra*, is to some extent an authority, if authority were needed, for holding that the court will grant specific performance of a contract relating to an undivided moiety of mineral property. To my mind the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted, and is not bound to take damages instead. The right to sue on a contract is the same in law and in equity but the remedies differ, and a court of equity will grant the

equitable remedy in all cases, so far as I have been able to discover, unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it.

I think the case *Knight Bruce, L. J.*, had in his mind would fall within the second category. I am not aware that the court has ever taken into consideration the comparative convenience or inconvenience of the plaintiffs and defendants apart from the consideration I have just mentioned. Whether the contract is a convenient or an inconvenient one is for the parties to consider when they enter into it. As regards a purchaser from a tenant in common, whether the purchase is of the fee or only of a lease, I cannot myself see that the purchaser need have any greater difficulty in working the minerals than the tenant in common himself would have had. I cannot assume that the defendant Wilkinson will act unreasonably. If he acts reasonably, then on the evidence before me I find that there is no difficulty in working. If I assumed that he was going to act unreasonably, I should not allow that to constitute a foundation for a defense which he would not otherwise possess.

Therefore I think this is a case in which I ought to grant specific performance.

Solicitors: CROWDERS, VIZARD & OLDHAM, for Windeatt & Windeatt, Totnes; MANN & CRIMP, for T. & J. Hutchings, Teignmouth.

PEABODY GOLD MINING Co. v. GOLD HILL MINING Co.

¹(106 Federal 241. U. S. Circuit Court, Northern District of California. December 17, 1900.)

Five years bars U. S. to vacate patent. The act of March 3, 1891 (26 Stat. 1099), provides that suits by the United States to vacate and annul patents for land issued before its passage shall only be brought within five years from its passage, and hence, no suit having been brought within such time to vacate and annul a patent issued before its passage, the government is precluded from taking action thereafter.

²Private person cannot maintain bill to cancel patent. A bill of complaint by a private individual to vacate and annul a patent for land issued by the government cannot be maintained if it does not show that complainant is or was entitled thereto, though it may appear that respondent was not, since the mere cancellation of a patent, with reversion to the government, rests solely with the latter.

On demurrer to Amended Bill of Complaint.

A. H. RICKETTS, for complainant.

E. W. MCGRAW, for respondent.

MORROW, Circuit Judge. This is a suit in equity to quiet the title of complainant to certain mining property in this state, and for an injunction restraining respondent from interfering with the rights of complainant in the premises in controversy. A demurrer to the original bill was sustained by this court on November 6, 1899, and the case now comes before the court upon the demurrer of the respondent to the amended bill of complaint. The decision on the former demurrer (97 Fed. 657) limited the jurisdiction of this court

¹Affirmed, 21 M. R. 591.

²*Meyendorf v. Frohner*, 5 M. R. 561. *Boggs v. Merced Co.* 10 M. R. 334.

to the contentions of complainant with respect to that portion of its mining claims lying within the surface boundaries of the land patented to the respondent; but, even as to such matters, the jurisdiction was held to be dependent upon the consideration to be given to the respondent's patent as against the matters charged in the bill. The amended bill set forth with more particularity the alleged fraud in the procurement of the respondent's patent, and the consideration before the court at this time is practically the right of the complainant to have the respondent's patent canceled and annulled.

The respondent contends that the fraudulent acts alleged in the amended bill are not sufficient to annul or set aside a patent, and, further, that a suit for the annulment of a patent for fraud in its procurement can be brought and maintained only by the United States. In this connection, it is argued that the government is precluded from bringing such a suit in the present case, even should it be determined that the facts would warrant such an action, because of the running of the statute of limitation. The act of March 3, 1891 (26 Stat. 1099), provides that suits by the United States to vacate and annul patents issued before the passage of the act shall only be brought within five years from the passage of the act. The patent in controversy was issued on August 9, 1883, before the passage of the act. The limitation prescribed by the statute would necessitate the bringing of suit for cancellation by the government not later than March 3, 1896. No such suit having been brought, the government is undoubtedly precluded from taking action in the matter at this time.

But private individuals are permitted to bring suits for the cancellation of patents to land under certain circumstances. Has the complainant, in its bill of complaint, shown such circumstances as to entitle it to that right?

In the case of *Boggs v. Mining Co.*, 14 Cal. 279, the court speaking through Mr. Justice Field, says:

"The proceeding by bill in equity, which an individual is allowed to take to set aside a patent or control its operation, is in the nature of a bill to quiet title,—to determine an estate held adversely to him, to remove what would otherwise be a cloud upon his own title,—or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complainant must therefore possess a title superior to that of his adversary, and, of course, to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name." And again: "Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them."

In *Lee v. Johnson*, 116 U. S. 48, the same justice, then of the United States supreme court, says, with regard to an attack upon a patent to land issued by the land department:

"The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected its determination, which otherwise would have been in favor of the plaintiff. He must in all cases show that, but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

It appears from the amended bill that the complainant claims to have owned, since the 7th and 23rd days of September, 1898, three mining claims, forming one piece or parcel of mining property, and is and has been since said

dates engaged in mining and developing the same; that a portion of said mining ground is covered by respondent's patent. It is alleged that said patent was fraudulently obtained from the land department on August 9, 1883, by means of false representations as to the location of the lode lying within such patented ground; that by reason thereof said patent was issued for a greater area of ground than is permitted by the act of congress of May 10, 1872, and is therefore void as to such excess; that said patent constitutes a cloud upon the title of the complainant in and to certain portions of its premises; that the respondent is infringing upon complainant's rights in said property, to its great and irreparable damage, etc. But nowhere does it appear that the complainant would have been, at the time of the issuance of the patent, or would now be, entitled to the patent itself, or that, but for the false testimony complained of, the determination of the land department would have been in favor of the complainant. No prior rights are shown to have been vested in complainant which were affected by the issuance of the patent to the respondent. Conceding for the sake of the argument, that the complainant could show that the patent should not have been issued to the respondent; this fact would not be sufficient, and would not avail, without the additional showing that the patent should have been issued to the complainant. The mere cancellation of the patent, with the reversion of the land to the government, is not within the province of a private party to effect by a suit in equity; that privilege rests only with the government. The demurrer will be sustained, and the bill dismissed.

ARTHUR BREWSTER V. GEORGE W. SHOEMAKER ET AL.

(28 Colorado 176; 63 Pac. 309. Supreme Court. December 17, 1900.)

Discovery after location complete. Where the location of a mining claim is void because no valid discovery of mineral has been made, a subsequent valid discovery within the boundaries of the claim made after the filing of the location certificate and all acts of location have been performed but before the rights of third parties have attached will make the location good.

Location of tunnel discovery. A valid location of a mining claim may be based upon an underground discovery on the dip of a vein at a distance below the surface, and without any surface opening upon the vein and without being shown by actual working to have its apex within the limits of the claim as staked.

Neither the fact that the tunnel was not recorded as a tunnel site, nor that its mouth was not within the lines of the claim nor that it had been run through the patented ground of strangers, invalidates such tunnel discovery.

Presumption of uniform dip. Where a discovery of mineral is made at a distance underground on the dip of the vein it will be presumed, in the absence of a showing to the contrary, that the vein extends upward at the same angle, and a valid location may be made by making the point where the vein, if continued to the surface, would be disclosed, the initial point and by marking and describing the boundaries therefrom.

Appeal from District Court, San Miguel County.

Action by Arthur Brewster against George W. Shoemaker and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

The action concerns a strip of ground in conflict between the Bootjack and Contention lode-mining claims, situate in

Contest between lode patented on surface, and lode cut below in tunnel, where the vein had been followed down from surface discovery and worked up from tunnel discovery. The instruction that burden of proof was on the tunnel to show that vein apexed outside the patent, held error. *Jones v. Prospect Co.* 17 M. R. 530.

San Miguel county. The Bootjack is the earlier location in point of time. When its owners (defendants) applied in the land office for a patent, plaintiff, the owner of the Contention lode, filed his adverse therein, and brought this action in its support.

The facts material to the present controversy may thus be stated: The location of the Contention lode was made on May 1, 1898. No question is raised as to its validity, provided it was unappropriated public domain at the time of plaintiff's entry. The location of the Bootjack lode is claimed as of the 9th day of November, 1897, and also January 28, 1898. The first discovery of mineral was upon patented ground, and not within the boundaries of the Bootjack claim, as staked. It was therefore void. On the 28th of January, 1898, a valid discovery of mineral was made within these boundaries, and an amended location certificate filed. Both these discoveries of mineral were at a point about 250 feet below the surface, and upon the same vein, and were made in driving a tunnel; the latter discovery being at a point on the vein uncovered by running the tunnel further into the mountain. It was not a statutory tunnel,—that is, not located under the tunnel site act of congress,—but was driven by the owners of the Bootjack lode through patented property, not belonging to defendants, and into the territory in dispute, under an arrangement made between the patentee and the tunnel owners.

The vein in the tunnel dipped about three degrees from the vertical. A calculation was made, based upon the dip of the vein as thus disclosed, and at a point on the surface where, according to such calculation, the vein should come to the surface, a discovery notice was posted, containing the statement required by statute; and also a recital that a like notice, which is admitted, was at the place of discovery (describing it), and information was given how to reach it through the tunnel. Starting with this discovery stake on the surface as

the initial point, the boundaries of the claim were designated and the stakes set, as the statute prescribes.

No tracing of the vein upwards was done, and no surface work performed, by the locators of the Bootjack claim. The vein found in the tunnel was not by actual exploitation shown to apex within the limits of the claim, but only as might inferentially appear from the calculation to which reference has been made. When the plaintiff appeared upon the ground and made his attempted location of the Contentiön lode, the posted notice and boundary stakes of the Bootjack were in place, and the location certificate was on file.

Upon this state of facts, and with evidence as to other acts necessary to constitute a valid location of a mining claim, the case was submitted to the jury, under the instructions of the court, and a verdict returned for the defendants, upon which judgment was entered.

GERRY & TAYLOR, and W. H. TRIPP, for appellant.

HOGG & HAMILL, for appellees.

CAMPBELL, C. J. Upon this appeal two questions only are important, and, as stated by appellant's counsel, they are:

1. Can a location admittedly void, because of an absence of a valid discovery of mineral, but regular in all other respects, be made good by a subsequent valid discovery of mineral within the limits of the location, made before the rights of third parties attach, but after the filing of the location certificate and all acts of location have been performed?

2. May a location of a valid mining claim be based upon an underground discovery of mineral made upon the dip of the vein at a distance of 250 feet below the surface, or any other distance, through a tunnel not statutory,—that is, not claimed under the tunnel site act of congress,—where the vein has never been opened upon the surface, or shown by actual

working to have its apex within the limits of the claim as staked?

1. Plaintiffs rely upon *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; *Id.*, 7 Mont. 449, 17 Pac. 728,—which was afterwards affirmed in *Larkin v. Upton*, 144 U. S. 19. In the opinion, as reported in 5 Mont. and 6 Pac., *supra*, it was said that a location void at the time it is made, because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located. Upon a second appeal of the same case, reported in 7 Mont. and 17 Pac., *supra*, the learned court seems to recognize the doctrine laid down by Mr. Justice Sawyer in the case of *Jupiter M. Co. v. Bodie M. Co.*, 11 Fed. 666, wherein it was said that in such a case a subsequent valid discovery, made before any other person has acquired any rights, will make such a location good. But the court proceeds at the second hearing, with the case then in hand, to say that the evidence sought to be introduced at the trial to show a subsequent valid discovery was properly rejected because it appeared—or at least it was not clear that the contrary was true—that the subsequent discovery to which the evidence was directed was made after the application for patent was filed. And the court held that a patent ought not to issue upon a discovery made after application. It also declared that the offer of evidence was not made in good faith, but to enlist the sympathy of the jury. In the review of the case by the supreme court of the United States there is nothing said to give color to the position taken here by appellant's counsel.

Whether the owners of the Bootjack lode, in connection with the second discovery of mineral,—the one within its exterior boundaries,—in January, 1898, supposed they were merely amending the former attempted location by correcting the description and filing an amended location certificate, or whether they intended to make, and supposed they were

making, a relocation of an abandoned claim, is immaterial; for, before the rights of third persons, including the claimant, attached, it is admitted that they had taken all of the steps which, under the federal and state statutes, constitute an appropriation of a lode mining claim. The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim, and refile their location certificate, or file a new one. In the case of *Beals v. Cone*, 62 Pac. 948, we have ruled against appellant's contention. The United States circuit court of appeals for the Eighth circuit, in *Erwin v. Perego*, 93 Fed. 608, in a case coming up from Utah, has reached the same conclusion. We know of no statutes of this state that require a different ruling. Other authorities sustaining our conclusion are *Craig v. Thompson*, 10 Colo. 517, 16 Pac. 24; *North Noonday M. Co. v. Orient M. Co.*, 9 Morr. Min. R. 529, 1 Fed. 522; *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Mining Co. v. Mahler*, 4 Morr. Min. R. 390; *Jupiter M. Co. v. Bodie M. Co.*, 4 Morr. Min. R. 411, 11 Fed. 666; 1 Lindl. Mines, § 335 et seq.; Morr. Min. R. (9th Ed.) 28, and cases cited.

2. In *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, it was held that when a tunnel claim has been duly located under the provisions of the acts of congress, and the owner thereafter discovers a mineral lode therein, he is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface location of the same lode. This case was affirmed by the supreme court of the United States in *Campbell v. Ellet*, 167 U. S. 116.

This, however, is not controlling of the proposition now under consideration. In the case at bar the defendants were not attempting to locate a tunnel site under the act of congress. The mouth of the tunnel was not upon the Bootjack claim, and the entire work was done upon patented land by the plaintiffs under agreement with the patentee. The point of discovery was over 800 feet from the mouth of the tunnel.

As well said by Mr. Morrison in his work on Mining Rights (9th Ed.) 30: "The fact of discovery is a fact of itself, to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery."

Certainly there is no requirement of the federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discovery shall be within the limits of the claim. Under our statute (Mills' Ann. St. § 3154; Gen. St. 1883, § 2403) where a lode is cut at a depth of 10 feet below the surface by means of an open cut, cross cut, or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth. *Gray v. Truby*, 6 Colo. 278; *Electro-Magnetic M. Co. v. Van Auken*, 9 Colo. 204, 11 Pac. 80.

The question here is not whether a subsequent discovery on the apex of the lode would take precedence of the prior discovery on the dip, for there is no claim here that plaintiff's subsequent location is on the apex of the same lode on whose dip defendants' discovery was theretofore made. But the question is whether a valid location can be made by a discovery at a point 250 feet beneath the surface, when it is followed up by a marking of the boundaries on the surface as though the discovery had been made from the surface, and by the doing of the other acts which the statute requires, though no surface work is done, and no actual tracing of the vein to the surface attempted.

The precise question has not, to our knowledge, been de-

cided by a court of last resort, but we do not see why a location such as has been made by the defendants is not good. It has been held that where the discovery is made in a discovery shaft along the course of a vein, and the surface boundaries marked with reference to its course or strike as disclosed in the discovery shaft, the presumption is that the vein continues on the same course throughout the limits of the claim. When, as in the case at bar, the discovery is made underground upon the dip of the vein, it is fair to assume, in the absence of a contrary showing, that the vein extends upward at the same angle; and a marking of the boundaries by making the place at which the vein, if continued to the surface, would be disclosed, the initial point, is a sufficient compliance with the law. That the mouth of the tunnel was not upon the claim we do not consider important.

That the tunnel was driven through patented property, not belonging to the owners of the lode discovered, is something of which the plaintiff cannot complain. If the owners of the land through which the tunnel is driven give their consent thereto, a third person may not object. Sufficient notice was conveyed to the public of this location. The defendants not only placed in the tunnel, at the point of discovery, a discovery stake and notice, but also posted the discovery notice on the surface, containing not only the things required by statute, but in addition informing the public of the exact spot where the discovery was made, and furnishing information how to reach the same through the tunnel, where inspection might be had.

We do not think it necessary, in a discovery which is made underneath the surface, that the locator shall, at the risk of losing his claim, demonstrate by actual working that the top or apex is within the limits of his location. In the absence of some proof to the contrary, the court will presume, as we have said already, that the vein continues in its upward course on the same angle to the surface; and if the locator selects and

traces his boundaries with reference to this place on the surface, so as to include it within the limits of his claim, nothing further in this respect is required. On this last point *Armstrong v. Lower*, 6 Colo. 393, and *Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283, though not deciding the precise question, are, in principle, authorities for the holding here.

The judgment of the court below is in harmony with our views, and it is affirmed.

¹ARGONAUT MINING CO. v. KENNEDY MINING & MILLING CO.

(131 California 15; 63 Pac. 148. Supreme Court. December 19, 1900.)

The owner of a patent issued under the Act of 1866 is entitled to all the rights which would attach to his mining location under the Act of 1866 and to any additional rights which enured to such location under the Act of 1872.

²Parallelism of end lines was not required under the Act of 1866, but the terms of the Act of 1872 cannot be construed to allow to an 1866 location the right to follow on the dip to the full extent of diverging end lines.

³May follow the dip at right angle to the strike. Under such a patent with diverging end lines the claimant neither loses all extralateral rights for that reason nor can he be allowed to follow his diverging end lines, but will be allowed the vein for the number of feet he owns on the strike and to follow down on the vein at right angles to the course of the vein on the strike.

In bank. Appeal from Superior Court, Calaveras County;
G. W. NICOL, Judge.

Action by the Argonaut Mining Company against the Kennedy Mining & Milling Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

JOHN M. WRIGHT and BYRON WATERS, for appellant.

LINDLEY & EICKHOFF, WM. J. MCGEE, and F. J. SOLINSKY, for respondent.

¹Affirmed by the Federal Supreme Court (189 U. S. 1), on a ground not mentioned in the text, but recited in an agreed statement of facts referred to in the appellate opinion, to-wit.: That the patents had been issued upon a written compromise which fixed the respective end lines; and that such agreed surface lines determined also the extralateral rights of the parties. And as the California Supreme Court found by construction of the law, the same bounding planes as were fixed by the compromise, their decision should stand affirmed.

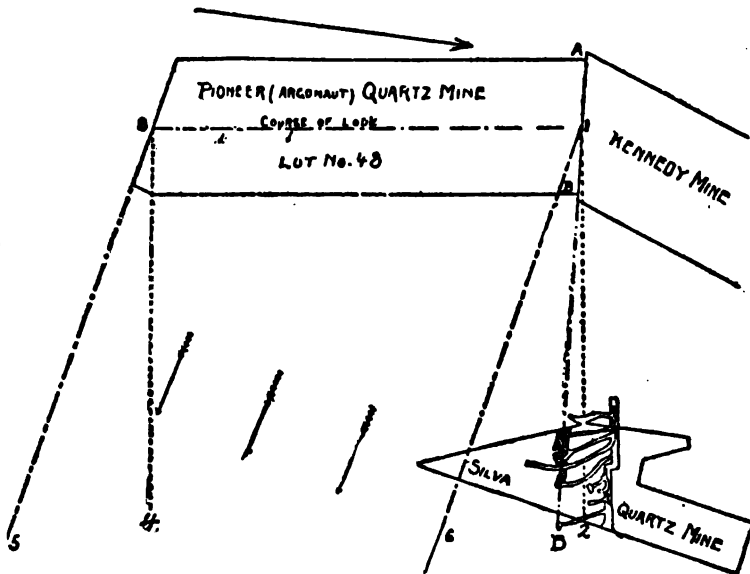
²*Walrath v. Champion Co.* 19 M. R. 410.

³*Carson City Co. v. North Star Co.* 19 M. R. 118.

TEMPLE, J. This is an action for damages for the value of ore alleged to have been taken by defendant from plaintiff's mine, situate in Amador county. The defendant denies taking any ore or gold-bearing rock from plaintiff's mine, and avers that defendant is the owner of the mine from which the rock was taken.

The cause was submitted in the trial court upon an agreed statement of facts, each party having the right to object to the relevancy, competency, and materiality of any part of it. Certain objections to evidence were made by the appellant, which were overruled by the court, and the main argument here has been in regard to these rulings. Much of the evidence was objected to simply upon the ground of immateriality. All that I deem it necessary to say in regard to such rulings is that, admitting that the trial court erred, as I am inclined to think it did, defendant has suffered no harm. The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence.

The controversy is indicated by the following diagram:



The plaintiff owns the Pioneer quartz mine, and the defendant owns the Kennedy mine and the Silva mine. All three mines had passed to patent before the ore was taken out by defendant. The ore was taken under the Silva location, and within its exterior limits carried vertically down. It was taken from the discovery lode of the Pioneer location, which is the only lode which has its apex within that location. The lode enters that location near the middle point of the southern end line, and runs northerly through the location in a direction practically parallel to the side lines, through the center of the northern end line. In fact, save that the end lines are not parallel, the location and the lode are the ideals upon which the rules and regulations of miners and the laws of congress seem to have been based.

The defendant does not assert any right to the ore in dispute by virtue of its ownership of the Kennedy mine, and nothing further need be said about it. Defendant asserts title to the ore by reason of its ownership of the Silva ground, under what counsel call the common-law right to everything beneath the surface. It admits plaintiff's ownership of the Pioneer mine, and that the lode has its apex, as stated, within its surface location, but denies that the quartz taken by it from that lode is within that location. This is asserted, as I understand the contention, upon two grounds: First, defendant contends that, because of nonparallelism of the end lines of the Pioneer, it carries no extralateral rights; and, second, if the court can as a matter of law construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel will be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The dip of the lode is easterly at an angle of about 60° from the plane of the horizon, and the end lines of the Pioneer diverge in that direction to the extent of about $14^{\circ} 45'$. The ore was taken out directly beneath the Silva surface

location at depths varying from 1,400 to 2,000 feet beneath the surface. The Silva location is more than 900 feet easterly from the easterly line of the pioneer location.

. The Pioneer was located, as the patent shows, under the law of 1866. The application for a patent was filed January 13, 1871. On the 23rd day of February, 1872, the Pioneer entered and paid for its mine, and the patent is dated August 12, 1872. The act to promote the development of the mining resources of the United States was passed May 10, 1872.

For reasons, which will appear as this opinion proceeds, I think plaintiff is entitled to all the rights which would attach to such a location under the law of 1866, and to any additional rights which inured to such locations under the act of 1872.

Among the contentions of the respondent is this: "Although the end lines were not required to be parallel under the act of 1866, yet if, by any process of reasoning, any limitation upon the extralateral right was imposed upon the locators' title by reason of the divergence of end lines, such limitation was removed by the act of May 10, 1872, which granted to owners of locations theretofore made the right to pursue the vein on its downward course, between the end-line planes of such location as it existed."

This proposition is based upon the language of the first proviso in section 3 of the law of 1872. After stating that the locators shall have certain lodes throughout their entire depth, although they may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines, it proceeds: "Provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges." Then follows another proviso, that no locator, by reason of

his right to the dip of his lode, shall be authorized to enter upon the surface of a claim owned by another.

These provisos grant no rights additional to those already given, nor do they purport to do so. They are both express limitations upon rights already given. The proviso does not confer ownership to all within those planes, but says, in effect, that no locator may pass beyond them. No rule of construction with which I am familiar would authorize or require a different reading of the section, especially in the face of the evident policy to strictly limit the rights of all locators as to length along the vein or lode.

We have many graphic accounts of the rush of gold hunters to California in 1849. The river banks and gulches were suddenly crowded with eager and earnest men anxious to dig for gold. There was no law by which any one could secure to himself any portion of the rich placers. In the absence of regulations, the strongest or most unscrupulous would get the lion's share. The miners, of necessity, made and enforced their own laws. Some regulations as to mining claims sprung into existence naturally, in fact necessarily. First, so far as possible, each person was given a specified portion of the ground, which he could mine. Secondly, the allotment to each was so limited that there should be no monopoly. So far as possible, all should have an equal chance. The right of the first possessor was preferred, but no matter was considered more important than the limitation upon the extent of the claims. And, thirdly, as a corollary from these two cardinal rules, the third follows: That each claimant shall mark plainly upon the surface of the earth the boundaries of his claim, that others may locate claims without interfering with him.

These essential rules have been the basis of most of the rules and regulations of miners, and have been recognized in every mining district on the Pacific Coast, and in all attempts by legislation, territorial, state, or national, to regulate min-

ing locations. Indeed, it may be said that the purpose of all these laws and regulations is to secure these ends.

These views are, as I think, expressed by Judge Field in the celebrated *Eureka Case*, 4 Sawy. 302. The locations there considered were made under the law of 1866, and one of the questions to be decided was whether the defendant was entitled to its allotted distance along the vein, although in its strike the vein passed beyond its exterior surface lines. There was no contention based upon diverging end lines, and there could not have been; for the ore body in dispute was within planes passing through the end lines of the Champion location, which belonged to plaintiff, and was not within such planes passing through the end lines of any location under which defendant claimed. Defendant, on this point, simply contended that it had the oldest location, and under the law of 1866 had a right to the number of feet on the lode called for in its location, although it extended within the junior locations owned by plaintiff. It was held that defendant could not follow the lode on its strike through any line of its surface location. In reaching this conclusion the court emphasized the invariable and inexorable policy to limit the location along the course of the vein to the quantity located, and to the line of the surface location, and to permit an extension of right only on the dip.

Bearing, then, in mind that the argument was to show that under the law of 1866 the locator could not, for the purpose of securing his length of lode, pass the lines of his surface location, we may be instructed by the decision. It is first said the locations under the law of 1866 are not invalid because the end lines are not parallel. The law did not require such parallelism, and the requirement in the law of 1872 was merely directory, and no consequence attached to a deviation from the direction. "Its object is to secure parallel end lines drawn vertically down, and that was effected in these

cases by taking the extreme points of the respective locations as the length of the lode."

The locator was limited to his number of feet on the lode throughout its entire depth, and the court realized that the only possible mode of so limiting the right was by parallel end lines. The miners seem to have regarded a lode as something like a plank. All a locator had to do was to measure off his distance upon it, and then make a "square cut" at the end. Judge Field's idea that the planes of the end "cuts" must be parallel in order to limit the locator at all depths to his number of feet claimed upon the surface is further shown. He says: "It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein, hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors, and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

Similar rules have been adopted in numerous mining districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining district in California or Nevada. And the construction is one which the

law would require in the absence of any construction by miners. If, for instance, the state were today to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width, cut through the block. No other mode of division would carry out the grant.

The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles, and variations, to any depth, although it may enter land adjoining; that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or "strike," as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode, at right angles with a line representing this general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass."

Judge Field here was endeavoring to show that the locator was limited, under the law of 1866, to the specified number

of linear feet on the lode throughout its entire depth. The extent of his right could be measured by the feet on the surface. The statement that the requirement in the law of 1872, that the end lines shall be parallel, was only directory, was overruled in *Iron Silver M. Co. v. Elgin M. & S. Co.*, 118 U. S. 196, but that the limitation upon the line or distance on the lode continues throughout its entire depth has always been recognized. And, indeed, it seems obvious that the opposite contention could not be thought of. A proposed rule may be tested by inquiring what may be done with it. Suppose the divergence here had been 150° instead of 15° , the dip being at a small angle from the plane of the horizon; the statutory limitation upon the length which could be taken on the lode would be a farce, even were the ledge the ideal ledge of miners. The Pioneer would soon have extended itself to the entire length of the lode.

I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location."

These words themselves, in my opinion, are sufficient to support the declaration of the court in the Eureka Case. Speaking of the limitations provided in section 3 of the act of 1872, which I have noticed, of lodes to planes through the end lines: "The act in terms annexes these conditions to the possession, not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply

recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes, found within the surface lines."

This proposition is substantially reiterated in *Iron Silver M. Co. v. Elgin M. Co.*, 118 U. S. 196, and in many other cases, including the latest to which our attention has been called, *Walrath v. Champion Co.*, 171 U. S. 293.

It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode 1,589.94 linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth; * * * provided, that the right of possession to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added, as a condition, "that the grant hereby made is restricted to the land hereinbefore described as lot No. forty-eight (48), with fifteen hundred and eighty-nine and 94-100 linear feet of the Pioneer quartz vein, lode, ledge, or deposit, throughout its entire depth," etc.

I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion that a patent to a location with end lines diverging in the direction of the dip does not convey all within those planes, but, at the most, not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extralateral rights at all. Such would be the law if the location were under the law of 1872, and, as the patent to the Pioneer was issued after that law took effect, counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extralateral rights. Another objection

is that there is no description of the segment of the lode which extends beyond the surface location, and no grant can be effectual which does not define the thing granted.

Parallel end lines were not required in locations by the law of 1866, and yet extralateral rights were specifically given. The act refers to rules and regulations made by miners, but it is not said that any such rule required parallel end lines. It is claimed in argument that such was, in general, the custom of miners, but it is not even contended that there was such a custom in Amador county, and all the patents shown in this case lack such parallelism.

I think it would have been competent for congress in the law of 1872 to have required parties who had equitable rights to patents to cause such adjustments of their surface lines as would indicate and define their extralateral rights; in other words, to have made their end lines parallel before a patent would issue, on pain of losing all extralateral rights. There are no such provisions in the act of 1872, but the rights of locators under former laws are expressly confirmed to them.

The presumption is very strong against forfeiture, and against such construction of any law as would work a forfeiture. The language of an act to have such effect must be very plain, or the court will, if possible, give a construction to it that would not have that effect.

It is admitted that such extralateral rights are recognized and asserted in the Eureka Case, and I think the language used by Judge Field in *Iron Silver M. Co. v. Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98 (the Horseshoe Case), is equally clear upon this matter: "Under the act of 1866 (14 Stat. 251), parallelism in end lines of a surface location was not required, but, where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes down through the side lines." This very clearly implies that a locator under

the act of 1866 has such right, although his end lines are not parallel. In many other cases the same thing is implied. *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72; *Walrath v. Mining Co. (C. C.)* 63 Fed. 552; *Id.*, 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170.

We come, then, to the other phase of the question: Can it be determined as matter of law, from the patent or the complaint, what segment of the dip, if any, the plaintiff acquired by his location or patent? It is admitted, or rather contended, by counsel on both sides that the court cannot construct end lines. If the court is to adjudge that plaintiff is entitled to follow the dip beyond his lines, it must find some mode of limiting the right along the vein, and that limitation must result as matter of law from the patent, when the necessary facts are shown as to the property it attempts to convey; that is, as to the course and dip of the lode.

The contention of the parties in regard to this matter is shown upon the diagram. Of course, it is understood that plaintiff contends for all included between planes drawn through its end lines, although they diverge, and would inevitably extend his rights along the strike, while defendant contends that because of such divergence plaintiff has no extralateral rights. But each party has an alternative theory, in case its primary contention is not sustained. Plaintiff says, if planes through its end lines do not control, then planes are indicated between lines perpendicular to the general course of the lode.

Defendant's alternative is that, as the southern end line constitutes the initial line in the survey, it necessarily follows from the requirement of parallel end planes that the northern end line shall be parallel to it; that by locating and fixing the southern end line first the northern end line was thereby also definitely and finally located. These theories are shown in the diagram. 3-5 is the southern end line continued; 1-6 is

a parallel line from the northern end of the lode. This shows defendant's theory. These lines would give the ore in dispute to defendant.

The lines suggested by plaintiff are 1-2 and 3-4. These are at right angles to the general course of the lode, and planes descending through them would give the ore to plaintiff. The line, B-B', is the northern end line continued, and between that line and 3-5 is plaintiff's first contention, which we have considered.

I am not referred to any authorities which support the contention of appellant that the southern end line must be considered as the basis from which the surface form of the location was projected. As stated, the argument is that, having been first located, it followed, as matter of law, that the other end line must be in the same direction in order that end lines may parallel. But the location was made, surveyed, the land paid for, and application made for the patent, before the law of 1872 was enacted. The act of 1866 did not require parallel end lines to insure extralateral rights, or at all. There was therefore no implication that the second end line should be parallel to that first established. It was not an absolute necessity, that by a naked description one end line should be described before the other. A side having been located, one sentence could have created both end lines from each end, and at right angles to the side line, in a certain direction. No such general rule, therefore, applicable to all cases could be adopted. Planes so constructed could not result as matter of law.

Planes through the lode at the end lines of the location, at right angles to the general course, would impose the required limitation upon the rights of the locator along the lode. The rule that they must be so constructed would be universally applicable; at least, theoretically. The congressional system for the sale of mineral lands is founded upon the proposition that the course of the lode can be traced. That nature, in her

infinite variety, does not always so deposit her mineral gifts, is unfortunate; but I think, in construing the law, we may have regard to the views of the lawmakers in regard to its subject, however crude and inadequate such views were. The law of 1866 is said to have been but a crystallization of the rules and customs of the miners. The first lodes worked were, I think, nearly in a uniform direction. The individual claims were short, usually 200 feet. Under such circumstances, it was not difficult to appropriate to each his number of feet on the dip at any depth. In California mines such claims were very often consolidated and disputes avoided. Often, as on the Comstock lode, the miners agreed upon a base line from which the surface form of locations were projected, or to which they were adjusted. This would result in parallel end lines.

The general practice, I think, was to have their claims bounded, so far as the lode was concerned, by parallel end lines, whatever might be the form of their surface location. In fact, they adopted the idea put forth by Judge Field in the *Eureka Case*. Their rights on the lode were limited to planes at the limit of their right to the lode on the surface, at right angles to the general course of the lode.

The *Eureka Case* is perhaps the only express authority for this proposition, but I do not find, as claimed by the learned counsel for the appellant, that it has been repudiated by later cases. On the contrary, these cases which imply extralateral rights when the end lines are not parallel seem to concede this rule. I am unable to understand *Walrath v. Mining Co.*, 171 U. S. 293, upon any other theory. There was liberty of surface form under the act of 1866, but the law strictly confined the right on the vein below the surface. This accords both with the *Eureka Case* and the *Flagstaff Case*, 98 U. S. 463. In the latter case it was said: "But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the

surface, although laterally its inclination shall carry it ever so far from a perpendicular." But rights on the strike were limited by the surface lines of the location under both laws. Judge Field was familiar with the mining customs and laws. I have no doubt he expressed in the Eureka Case what had been and was the universal understanding and practice of miners. The rule there declared seems to me reasonable, and, in fact, the only one that can be applied to such patents issued under locations made before the law of 1872 came into existence. If, as suggested, the officers of the land office usually adjust and make the end lines of locations parallel before issuing the patent, such patents, when issued, will be conclusive evidence that such also was the location.

A case has been cited in which the end lines of the location converge in the direction of the dip. *Carson City M. Co. v. North Star M. Co.*, 73 Fed. 597. It was held that the locator had extralateral rights because the conveyance would give less rather than more on the dip of the vein. This may be all right, as it seems to me, however, not because the patent carries less rather than more than would pass had the end lines been parallel, but because that which is granted is described so that it can be definitely located. Under the force of the restriction contained in section 3 of the law of 1872, the locator could not take beyond planes through his end lines. This confined him, within well-defined boundaries, to less on the dip below the surface than he had upon the surface. If this was an attempt to construe the act of 1872, the logic might be questioned. That act as construed, does not grant extralateral rights because the end lines are parallel or converge towards the dip of the vein, but if they are parallel. The location there under consideration was made under the act of 1866, and carries extralateral rights because the extent of such rights is definitely described. At least, such was the fact, and no other reason was required. It was therefore not necessary in that case to consider the point here under debate.

If this position be correct, the complaint does definitely describe the segment of the lode from which the ore was taken. The judgment is affirmed.

McFARLAND, J., GAROUTTE, J., HENSHAW, J., HARRISON, J., and BEATTY, C. J., concurred.

GEORGE K. MARSHALL V. THE FOREST OIL CO.

(198 Pennsylvania 83; 47 Atl. 927. Supreme Court. January 7. 1901.)

Right of party in possession to defend. A party found in possession of the demanded premises in ejectment is required by statute to be served though not named in the writ or such a party may accept service and should be noted by the prothonotary as a defendant. The order of Court adding such party to the record as a defendant is merely doing what the prothonotary should have done in the first instance.

No forfeiture for nonpayment of rent. Where an oil lease provides for a rental during delay to operate it is fixed damages to be collected by suit and nonpayment does not work a forfeiture.

Nonpayment not of itself abandonment. Where a lease provides for forfeiture upon abandonment of operations evidence of nonpayment of rent is admissible only as one item under all the circumstances on the issue of abandonment.

Appeal from Court of Common Pleas, Butler County.

¹*Edwards v. Iola Gas Co.* 65 Kans. 362; 22 M. R. —. *Plummer v. Hillsdale Co.* 104 Fed. 208.

A provision that the lessor may re-enter for non-payment of rent cannot be enforced without a previous demand. *Poterie Gas Co. v. Poterie*, 179 Pa. 68; 36 Atl. 232.

Lease held forfeit for 9 days delay in sinking 100-foot shaft. Montrozona Co. v. Thatcher, — Colo. App. —; 75 Pac. 595.

Acceptance of annual payment under an oil lease held a waiver of the right to forfeit for one year. *Consumers' Co. v. Littler*, 162 Ind. 320; 70 N. E. 363.

Where the lessee has a reasonable time to start a well and the lessor accepts rent for one year's delay, he has still at the expiration of the year a reasonable time to begin. *Id.* Followed in *Consumers' Co. v. Crystal Co.* — Ind. —; 70 N. E. 366.

The acceptance of an annual rent is waiver of the right to enforce forfeiture during the year. Refusal to receive the rent is a demand upon the lessee to sink, but he has a reasonable time thereafter to commence operations. But a demand of forfeiture when the term has not been forfeited is not equivalent to a demand that lessee begin operations. *Consumers' Co. v. Ink*, — Ind. —; 71 N. E. 477. *Same v. Worth*, 71 N. E. 489. *Same v. Howald*, 71 N. E. 493.

Ejectment by George K. Marshall against the Forest Oil Company. Judgment for defendant. Plaintiff appeals. Reversed.

At the trial it appeared that plaintiff claimed under an oil and gas lease from A. H. Knauff; defendant claimed under an oil and gas lease which A. H. Knauff had made to S. S. Reesciman. The lease from Knauff to Marshall was as follows:

"This agreement made and concluded this 28th day of August, 1895, by and between A. H. Knauff, of Forward township, county of Butler and State of Pennsylvania, party of the first part and George K. Marshall, party of the second part:

"Witnesseth: That the said first party, for and in consideration of the sum of six hundred and seventy-five dollars to him in hand paid, the receipt of which is hereby acknowledged, and in further consideration of the covenants and agreements hereinafter contained, does covenant and agree to lease, and by these presents, has leased and granted the exclusive right unto the second party, his heirs and assigns, for the purpose of operating and drilling for oil, petroleum and gas, to lay pipe-lines, erect necessary buildings, release and subdivide all that certain tract of land situate in Forward township, county of Butler, State of Pennsylvania (being part of a larger tract of land) bounded and described as follows, to-wit:

"On the north by lands of the first party, formerly leased to McQuiston and Marshall; on the east by lands of public road; on the south by land of Henry Buhl; on the west by lands of same, containing fourteen acres, more or less. The party of the second part agrees to commence operations on the above described part or parcel of land hereby leased within ninety days from the date hereof, or thereafter pay to the party of the first part a rental of fourteen dollars per month until operations are commenced, payable direct or at the Butler County National Bank, the party of the second part to have and to hold the premises for and during the term of ten years from the date hereof and so long thereafter as oil and gas can be produced in paying quantities by the second party, his heirs and assigns.

"The party of the second part agrees to give the first party the one-eighth part of the petroleum or oil obtained from the said premises as produced in the crude state, the said one-eighth part to be set apart in the pipe-line running said petroleum to the credit of

the party of the first part. First party is to freely use the premises for the purpose of tillage, except such part as shall be necessary for said mining purposes or operating, and a right-of-way from and to the place of operating. Second party to have sufficient water and gas to run the engines and the right to move any machinery, fixtures and buildings placed on said premises by said second party or those acting under him.

"If gas is found in sufficient quantities to be utilized off the premises, the consideration to first party shall be one-eighth for each well so utilized. Second party hereby agrees to drill sufficient wells to protect the lease on the above described property, when operations are commenced to proceed with due diligence.

"All gates and fences to be shut. If second party abandons this lease and moves all his property off, it shall become null and void.

"It is further agreed that the second party, his heirs or assigns, shall have the right at any time to surrender up this lease by paying the rentals, if any then due, and be released from all conditions unfulfilled, then and from that time this agreement shall be null and void and not binding on either party, and the payments made shall be retained by the first party as the full stipulated damages.

"All conditions shall extend to the heirs, executors and assigns of both parties."

The other material facts in the case relating to the lease and claim of forfeiture are fully stated in the opinion of the supreme court.

It appeared from the record that the sheriff made a return of an acceptance of service by attorneys for A. H. Knauff. When the return was made the prothonotary did not add the name of A. H. Knauff as a party. On June 7, the defendant made the following motion:

And now, to wit: June 7, 1900, defendant by their attorney, before jury is sworn, move the court, the sheriff having served the writ in this case upon A. H. Knauff and made return that he is in possession of the premises, to add the name of A. H. Knauff to the record as party defendant.

Upon which the court made the following order:

It appearing to the court that the defendant company is claiming title to the land described under its lease made by A. H. Knauff, subject to a lease under which the plaintiff

claims, the amendment is allowed as asked for before jury sworn.

Plaintiff presented these points.

1. The plaintiff's lease has not been forfeited by a failure to pay rentals.
2. The plaintiff's lease has not been forfeited by a failure to begin operations.
3. The plaintiff's lease has not been forfeited by a failure to continue operations with due diligence.
4. There has been no forfeiture of the plaintiff's lease.
5. There is no evidence of an abandonment of the plaintiff's lease.
6. There is no evidence of a surrender of the plaintiff's lease.
7. Under all the evidence the verdict must be for the plaintiff.

The Court: The points above can all be answered in one answer. Before the plaintiff can recover the possession of the land described in the writ he must convince you from the weight of the evidence that he has fully complied with the covenants in the lease and has done all he promised therein, unless he was released by the lessor, Knauff, or released from some of them by him as claimed by the plaintiff, which is a fact to be determined by you from the evidence. Gentlemen, another question—when Mr. Knauff leased this land to Mr. Marshall he had a right to employ whomsoever he pleased, and Mr. Knauff had not the right to name the men to be employed by him, and if he had prevented the operation of the lease on that account, then he would have stood in the way of Mr. Marshall's operations and could not have set that up; but the gentlemen talked together and seem to have made some arrangement by which this is out of the case. (2-8.)

J. D. MARSHALL, for appellant.

T. C. CAMPBELL, R. W. CUMMINS and W. D. BRANDON,
for appellee.

BROWN, J. On August 28, 1895, A. H. Knauff, the owner of 14 acres of land in Forward township, Butler county, granted to the appellant the exclusive right to drill and operate for oil and gas on it for the term of 10 years, "and so long thereafter as oil and gas can be produced in paying quantities." The consideration for this was \$675, paid by the lessee at the time of the execution of the lease, and one-eighth of all the oil and gas produced. The lessee agreed to commence operations within 90 days from the date of the lease, or after that period to pay the lessor \$14 per month as a rental until he should commence them. The lessee did not commence his operations at the expiration of the 90 days, but paid the rental to May 28, 1897. On the day preceding—May 27th—he made a location, and was about to commence, when, according to his testimony, he stopped in pursuance of an understanding with Knauff that, if he kept a man named Burr off the premises, the time for beginning work was to be indefinitely extended, and no rental was to be charged for the interval of inactivity. After May 27, 1897, the lessee did nothing, and on May 22, 1899, Knauff leased the premises, for oil purposes, to S. S. Reeseman, who assigned the lease to the Forest Oil Company, the appellee. Subsequently, on October 20, 1899, Marshall, the appellant, brought ejectment against this company for the recovery of possession of the property. Service of the writ was accepted for Knauff, and by leave of court, under plaintiff's objection, he was made a party defendant. The verdict was for the defendants, and, on this appeal from the judgment entered, the court's permission to make Knauff a party defendant to the suit, and its alleged failure to properly instruct the jury as to the forfeiture and abandonment of the lease by Marshall, are assigned as error.

The writ was originally issued against the Forest Oil Company as sole defendant. It was never actually served. Service was accepted for the company by its attorneys, and the

sheriff received an acceptance of service from the attorneys of Knauff as "party and owner in possession." Return was made of these acceptances of service, and it was equivalent to a return that the sheriff had served the writ on Knauff. By section 2, Act April 13, 1807 (4 Smith's Laws, 476), it is provided that: "Where any writ of ejectment shall be issued and on the service thereof it shall appear to the sheriff that other persons not named in the writ are in possession of the premises or part thereof, such sheriff shall add the name of such person or persons to such writ and serve the same, and on return thereof the prothonotary shall enter such additional defendants to the action and they shall be parties thereto." Under this section it was the duty of the sheriff, if it appeared to him that Knauff, though not named in the writ, was in possession of the premises, to serve the same on him, and the return of the acceptance of service for him was, as just stated, equivalent to actual service, and proof that it did appear to the officer that Knauff was in possession of the premises. What the court did was not to allow an amendment under the act of May 4, 1852 (P. L. 574), by adding the name of a defendant omitted by mistake, but was carrying out the express provisions of the act of 1807; and at the time of the trial the prothonotary was directed to do what he ought to have done when the writ was returned to him by the sheriff. The first assignment is not sustained.

The first point submitted by the plaintiff was: "The plaintiff's lease has not been forfeited by a failure to pay rentals." Neither this nor the others were specifically answered by the court. The learned judge said of them all together: "The points above can all be answered in one answer. Before the plaintiff can recover the possession of the land described in the writ, he must convince you from the weight of the evidence that he has fully complied with the covenants in the lease, and has done all he promised therein, unless he was released by the lessor, Knauff, or released from

some of them by him, as claimed by the plaintiff, which is a fact to be determined by you from the evidence." In this general answer the jury were instructed that there could be no recovery by the plaintiff unless he had fully complied with his covenants in the lease and done all he had therein promised; and in the general charge the learned trial judge made clear what he meant in so instructing them. He told them that the plaintiff "must commence the well, or pay the rental; and unless he has drilled the well, commenced it, and followed it up with due diligence, or paid the rental, he would not have the right to maintain this action of ejectment, unless the owner of the land in some way released him from the covenants in the agreement. * * * We say that this lease has no forfeiture clause in it, yet, nevertheless, Mr. Marshall could not enforce, through the courts, a right of entrance upon that land, until he would fully comply with his part of the contract; that is, he would have to commence operations within the time fixed, or pay the rentals, unless released by the man who had the right and power to do so; and that becomes a question. * * * If you should find that there was no such arrangement, as Marshall claims, by which the time for drilling was extended or rentals released, then we say to you the verdict must be for the defendant, because Mr. Marshall cannot maintain an action of ejectment for the possession of this ground until he fully complies with his covenants in the lease." By these instructions the jury were unmistakably given to understand that the failure of Marshall to pay the monthly rental, unless released from the same, was a bar to his right to recover. This was error, and the first point submitted by the plaintiff should have been affirmed. There is nothing in the lease providing that it should be forfeited by the nonpayment of the rental. The only forfeiture contemplated is that resulting from an abandonment of the lease, and the removal of the lessee's property from the premises; and the lessor could not have rescinded the lease because the

lessee failed to pay the monthly rental. He had a right to enforce payment of the same by suit against the lessee for each monthly default, and upon such default in a short time any right of the latter in the leased premises would have been divested in proper proceedings by the former. *Hooks v. Forst*, 165 Pa. 238, 30 Atl. 846. There was no absolute covenant on the part of the lessee to develop the land. His agreement was that he would commence operations within a specified period, or thereafter pay a certain fixed sum monthly as rental for the premises, which must be considered as damages to the lessor, liquidated by the parties to the lease, for the delinquency of the lessee in commencing his operations. The covenant of the lessee was to pay a certain consideration for the forbearance of the lessor, and not that the leased premises were to be held upon a certain condition, violation of which was to be forfeiture. The breach of the covenant as to the monthly rental was a breach of a promise to pay a consideration for indulgence, and for it the lessor could neither recover nor defend in ejectment. He could proceed for the collection of the rent due, and upon failure to recover it the lessee's rights would be divested. This controversy would have been properly submitted to the jury on the question of Marshall's abandonment of the lease; and his failure to pay the rental and his general conduct in connection with the leased premises might all have been taken into consideration by the jury in determining the question of abandonment, which was one of intention. (*Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555); but having been instructed that his mere failure to pay the rental, unless released from the same, was a bar to recovery, the jury may have been misled, and their finding may have been based upon that instruction. It is not for us to say whether they found for the defendant on the question of abandonment or of nonpayment of rental. It is sufficient to know that under the instructions they could have found for the defendant, because he had not paid the

rental, and they may have so found. As stated, this was error, and the case must be retried. The first, second, and third points should have been affirmed, and in answer to the fifth, sixth, and seventh the court should have instructed the jury that whether there had been a forfeiture by abandonment of the lease depended upon the acts and intention of the lessee as they found them from the testimony. The eighth point need not be considered.

The judgment is reversed, and a venire facias de novo awarded.

YOUGHIOGHENY RIVER COAL CO. v. JAMES H. HOPKINS.

(198 Pennsylvania 343; 48 Atl. 19. Supreme Court. January 7, 1901.)

¹Ordinary precautions. The accident proves the negligence. A coal mining lease contained a clause under which it was claimed that the lessor should save the lessee harmless from any damages that might accrue to surface owners, provided the lessee should take "all ordinary precautions usually taken in mining and removing coal." *Held*, that the result, the subsidence of the surface, was conclusive proof that ordinary precautions had not been taken.

Ordinary precautions mean in mining coal, proper support to the overlying surface.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Youghiogheny River Coal Company against James H. Hopkins. Judgment for defendant. Plaintiff appeals. Affirmed.

The plaintiff's statement, after setting forth portions of the

¹Distinction between surface support and lateral support. *Mattlys v. Philadelphia Co.* 21 M. R. 745.

The term "surface rights" explained. *Keweenaw Assn. v. Friedrich*, 112 Mich. 442; 70 N. W. 896.

The owner of the coal is bound to support surface. *Robertson v. Youghiogheny Co.* 172 Pa. 566; 33 Atl. 706.

Enumeration of special surface rights does not impair the general implied right to surface user. *Williams v. Gibson*, 16 M. R. 243.

A reservation of underlying coal contained a proviso that the grantor in mining should do as little damage to the surface as possible: *Held*, that this referred to damage incident to his surface rights to bore, etc., and was not a waiver of grantees' absolute right of support. *Williams v. Hay*, 120 Pa. 485; 14 Atl. 379.

Trespass on the case lies for destruction of support. *Id.*

Coal lessees held a lease not authorizing them in terms to rob back the pillars but they claimed an understanding to this effect

lease, the material parts of which are quoted in the opinion of the supreme court, continued as follows:

That in accordance with the said agreement, the plaintiff entered into the possession of the said demised coal tract, and mined and removed part of the said coal, taking all the ordinary precautions usually taken in mining and removing the said coal, and under the supervision and direction of the defendant in accordance with the provisions of the said lease.

That in so mining and removing a portion of the said coal, a part of the surface overlying the same, belonging to Andrew Robertson et al., was necessarily injured and damaged, and at No. 89, December term, 1893, in the court of common pleas, No. 1, of Allegheny county, an action for damages was entered by the said Andrew Robertson et al., against the plaintiff herein, the Youghiogheny River Coal Company, wherein it was alleged that the said Robertson et al., were the owners of the surface overlying part of the said Hopkins coal tract, under which part coal had been mined and removed, and damages caused to the said surface, and although the said suit was duly defended by the plaintiff herein a verdict was recovered therein against it, which with costs and expenses,

They were enjoined by the surface owners from so doing. *Held*, that they had no remedy in covenant against their lessor for the value of the pillars. *Heckscher v. Shaffer*, (Pa.) 14 Atl. 53.

Case where surface support was claimed by a party exercising eminent domain after surface owner had released right of surface support to coal owner. *Penn. Gas Co. v. Versailles Co.* 131 Pa. 522; 19 Atl. 933.

A surface owner may recover for negligence in mining or failure to leave proper support or on both theories together. *Pringle v. Vesta Coal Co.* 172 Pa. 438; 33 Atl. 690.

A lease to mine "all the coal" does not give the right to deprive the surface of support. *Mickle v. Douglas*, 17 M. R. 137.

Liability as between lessor and lessee of mines, and surface owner. *Hill v. Pardee*, 143 Pa. 98; 22 Atl. 815.

Soil but not buildings, entitled to lateral support. Proof of negligence not required in such case. *Matulis v. Philadelphia Co.* *supra*.

including an appeal to the supreme court, amounts to the sum of \$3,233.45, with interest from January 14, 1896.

That due and formal notice was given to the defendant herein by the plaintiff herein to assist in defending the said claim for damages, as it was the duty of the said James H. Hopkins to do under his hereinbefore recited covenants, and he was further notified that plaintiff would demand reimbursement in case of an adverse decision in said suit.

That plaintiff was compelled to pay the amount so recovered against it, and is now entitled to be reimbursed therefor by the said James H. Hopkins under his said covenants, and he is therefore now indebted to the plaintiff, the Youghio-gheny River Coal Company, in the sum of \$3,233.45, with interest from January 14, 1896, as aforesaid.

The grounds of demurrer were as follows:

1. That under the covenants in the lease set forth in said statement on which said action is founded, plaintiff has no cause of action for reimbursement of the damages and costs recovered against the plaintiff in said suit of *Andrew Robertson et al.* against the plaintiff at No. 89, December term, 1893, in common pleas No. 1 of Allegheny county.

2. That the statement does not aver that the alleged representations of defendant to plaintiff's agent, that defendant had the right to take and remove said coal without liability to the owners of the surface for any damage that might result thereto by reason thereof, were omitted from said lease by fraud, accident or mistake. And said representations do not of themselves constitute an agreement, and, as appears by said statement, were not contemporaneous with the execution of said lease.

3. The statement does not show what damages were recovered in said action of *Andrew Robertson et al.* against the plaintiff, nor the amount of the taxable costs therein, the plaintiff in no event being entitled to recover counsel fees or other expenses from the defendant in the present action, included in the lump sum of \$3,233.45, sought to be recovered.

4. That the said statement is in other respects uncertain, informal and insufficient.

The court sustained the demurrer.

JOHN O. PETTY, for appellant.

THOMAS C. LAZEAR and CHARLES P. ORR, for appellee.

BROWN, J. In mining coal under a lease to it by the appellee the appellant caused injury to the overlying surface of one Robertson and in a suit brought by him against it damages were recovered. Thereupon this coal company brought the present suit to compel Hopkins, the appellee, and its lessor, to pay what it, in pursuance of the judgment against it, had paid to Robertson, together with costs and expenses. The judgment now reviewed was in favor of the defendant on his demurrer to plaintiff's statement. Turning to it, we find the following clause from the lease, upon which the right to recover depends: "And together with said coal, and as appurtenant thereto, is hereby granted and conveyed the free and uninterrupted right of way over, into, under, and through the said tract as above described, at, to, and from such point or points, and in such manner as may be necessary, proper, or convenient for the purpose of digging, mining, and transporting or carrying away any and all of the said veins or strata of coal hereby demised; together with all the mining rights, privileges, and easements necessary or useful for the convenient draining, ventilating, and operating openings into said veins and otherwise, some of which privileges are the making and using of openings or air-holes and drains and drifts in the surface, and in the making of surveys for the underground entries or tunnels and the like. And all damages, direct or consequential, and claims therefor, resulting from the mining and removal of said coal in the doing of any and all the matters and things hereinbefore described are hereby waived and relinquished by the said party of the first part, provided the party of the second part takes all ordinary precautions usually taken in mining and removing coal." The declaration, as stated by the court below, is not so full and minute as

it should be in stating the character of the injury done to Robertson's property, and the facts out of which the liability to him arose; but in passing upon the question before us we assume, what seems to be conceded by both sides, that the allegation of the plaintiff is that it had been compelled to pay Robertson for damages sustained by him in the sinking of the surface, which the jury in his suit against it found had not been properly supported by it in mining the coal. The question is, therefore, simply whether, under the lease by Hopkins to the coal company, he is bound to reimburse it for the damages recovered against it by Robertson, a stranger to the agreement, whose surface had subsided as a result of the removal of the coal beneath it. The contention of the plaintiff is that Hopkins must pay, because a covenant to protect it is found in the following words of the clause quoted: "And all damages, direct or consequential, and claims therefor, resulting from the mining and removal of said coal, in the doing of any and all the matters and things hereinbefore described, are hereby waived and relinquished by the said party of the first part." But, even if it be true that such covenant is there found, the concluding words, "provided the party of the second part takes all ordinary precautions usually taken in mining and removing coal," seem to be overlooked. "Ordinary precautions" mean, in "mining coal," proper support to the overlying surface. *Jones v. Wagner*, 66 Pa. 429; *Horner v. Watson*, 79 Pa. 242; *Coleman v. Chadwick*, 80 Pa. 81; *Carlin v. Chappel*, 101 Pa. 348; *Robertson v. Coal Co.*, 172 Pa. 566, 33 Atl. 706. If such support had been given by the coal company to the surface of Robertson, there would have been no subsidence, and his suit would not have been brought. The admission by the appellant in its statement that he had recovered is an admission, even in the face of the averment that all ordinary precautions had been taken in mining and removing coal, that the appellant had not used

them in continuing or giving proper support to the surface. Such admission was fatal. The court below so properly regarded it in denying the appellant's right to recover. We need consider nothing else brought to our attention by the appellant or the appellee, and the judgment is affirmed.

MANUFACTURERS' GAS & OIL CO. ET AL. V. INDIANA NATURAL GAS & OIL CO.

(156 Indiana 679; 59 N. E. 169; 60 N. E. 1080. Supreme Court. January 9, 1901.)

¹**Injunction against artificial pressure.** In an action to enjoin the transportation of natural gas through pipes at a pressure in excess of the natural rock pressure by means other than the natural pressure of the gas flowing from the wells, as prohibited by §§ 7507, 7508, 7509, Burns 1894, it must be shown that plaintiff sustains, or is likely to sustain, some special injury, or that he or his property is exposed to some particular damage which the statute was intended to prevent.

²**Allegation of special injury by forced pressure.** A charge in a complaint to enjoin the transportation of natural gas that "in and by so transporting natural gas through the pipes at a pressure in excess of the natural rock pressure, and by such means and appliances other than the natural pressure of the gas flowing from the wells, the defendant has drawn, and is continuing to draw so heavily through its said wells upon said reservoir as to seriously diminish the supply and pressure of gas therein" is not equivalent to an averment that an unnatural flow of gas from the wells was induced by means of the machinery or appliances used by defendants, or that such unnatural flow was a necessary consequence of the use of the machinery and appliances so used.

Appeal from Circuit Court, Grant County. H. J. PAULUS, Judge.

Action by the Manufacturers' Gas & Oil Company and others against the Indiana Natural Gas & Oil Company. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

¹*Manufacturers' Gas Co. v. Indiana Gas Co.* 20 M. R. 672.

²*Jones v. Forest Oil Co.* 20 M. R. 350.

Construction of Indiana Statute in regard to plugging wells holding it a penal act to be strictly construed. *McDonald v. Carlin*, — Ind. —; 71 N. E. 961.

MANUFACTURERS' GAS CO. v. INDIANA NAT. GAS CO. 195

WARNER & BRADY and WM. A. KETCHAM, for appellants.

M. WINFIELD, FOSTER DAVIS, W. O. JOHNSON, and
BLACKLIDGE, SHIRLEY & WOLF, for appellee.

DOWLING, C. J. Suit by the appellants for an injunction to prevent the appellee from transporting natural gas through pipes at a pressure in excess of the natural rock pressure, and by means other than the natural pressure of the gas flowing from the wells. The ground of the action is the supposed violation of the provisions of the act of 1891 (Acts 1891, p. 89; Burns' Rev. St. 1894, §§ 7507-7509), which in terms prohibits the transportation of natural gas through pipes at a pressure in excess of the natural rock pressure, or by means other than the natural pressure of the gas flowing from the wells.

The enactment of this statute was an exercise of the police powers of the state, and on that ground its constitutional validity was sustained in *Jamieson v. Oil Co.*, 128 Ind. 555, 28 N. E. 76. The dangerous qualities of natural gas rendered it necessary for the protection of the persons and property of the inhabitants of this state that the pressure under which it was to be transported through the state, and the strength of the pipes through which it might be conveyed, should be regulated by statute. The act does not directly nor indirectly attempt to prevent waste of the gas, nor to prohibit any well owner from taking from his own wells any quantity of natural gas he may be able to obtain without the use of any device for pumping, or other artificial process or appliance for the purpose of increasing the natural flow of gas from any well. The provisions of the section in question in this case can be enforced at the suit of a private person only where such person can show that he sustains, or is likely to sustain, some special injury, or that he or his property is exposed to some particular damage, which this statute was intended to pre-

vent. The appellants present no such case. It is not averred that their property is endangered by the alleged wrongful acts of the appellee, nor does it appear that they are likely to sustain any special injury peculiar to themselves in consequence of the violation of the act by the appellee. The section referred to (section 1) does not undertake to provide the means of prevention or redress for any class of injuries except those resulting from the use of excessive pressure, or pressure created by artificial means. Such injury, under the statute, must be shown to be threatened or anticipated with reference either to the persons or the property of those seeking a remedy by way of injunction. It is entirely clear that section 1 furnishes no basis for relief where the injury alleged is the diminution of the supply of natural gas. *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 566, 58 N. E. 851.

The complaint failed, in the particulars mentioned, to state facts sufficient to bring the appellants within the remedial scope of the statutes, and the demurrer to it was properly sustained.

Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM. And afterwards, towit, on the 28th day of June, 1901, the court, being fully advised in the premises, overrules the petition for a rehearing heretofore filed herein by appellants, with an opinion as follows: The relief sought in this suit was an injunction restraining the appellees from transporting natural gas from their wells through pipes at a pressure exceeding the natural rock pressure, or by other means than the natural pressure of the gas flowing from the wells. It is not charged in the complaint that an unnatural flow of gas from the wells is induced by means of the machinery or appliances used by appellees, or that such unnatural

flow is a necessary consequence of the use of the machinery and appliances so used. The charge is that "in and by so transporting natural gas through the pipes at a pressure in excess of the natural rock pressure, and by such means and appliances other than the natural pressure of the gas flowing from the wells, the defendant has drawn, and is continuing to draw, so heavily through its said wells upon said reservoir as to seriously diminish the supply and pressure of gas therein," etc. The flow of the gas from the appellees' wells into its pipes and reservoirs, it is to be understood, is the natural flow, unaffected by machinery or artificial appliances. If such flow should be unnaturally stimulated or increased by machinery or other means, for the purpose of transporting, or as a necessary result thereof, then, independently of the statute under consideration, the appellants would have the right, if they sustained special injury thereby, to enjoin the use of such machinery and appliances, not because the appellees were transporting natural gas under an excessive pressure, but for the reasons stated in *Manufacturers' Gas & Oil Co. v. Indiana Gas & Oil Co.*, 155 Ind. 461.

Petition for a rehearing overruled.

A. W. HOSFORD ET AL. V. MATTHEW W. METCALF ET AL.

(113 Iowa 240; 84 N. W. 1054. Supreme Court. February 1, 1901.)

Not confined to mineral at the time intended to be mined. Where the owner of land orally granted mining privileges therein to defendants at a time when mining operations in the locality were being conducted for lead only, and not for zinc, and defendants discovered zinc, which they did not mine for several years, because there was no market, such facts did not show that the license was contemplated by the parties as restricted to the mining of lead only, but the privilege extended to zinc.

Expenditure under license makes it a property interest. A parol grant of mining privileges in land, on the strength of which grantees expended much money and labor in work on the premises, gave grantees an interest in the land, entitling them to continue, and which was transferable, and was not merely a personal license and revocable.

Cesser of work without abandonment. Where defendants secured mining privileges in land at a time when zinc mining was not profitable, and, discovering only zinc, did not work the mine for several years, but afterwards worked it from time to time whenever the market for zinc warranted, there was no abandonment.

Waiver of first default. The fact that the owner might have taken possession on the first failure to work the mine, but did not do so, did not give plaintiffs the right to dispossess defendants under a grant from the owner's heirs.

Revocation. Decease. Compensation. Such ripened license was not revoked by the decease of the granting party, nor could the heirs or their grantees revoke it by tendering compensation.

License to mine by co-tenant will not bind his fellows although by statute a license to a miner, after ore struck, is irrevocable. *Tipping v. Robbins*, 71 Wis. 507; 37 N. W. 427.

A license to construct ditch when acted on becomes irrevocable. *Garrett v. Bishop*, 27 Oreg. 349; 41 Pac. 10. *Smith v. Green*, 109 Cal. 228; 41 Pac. 1022. *DeGraffenreid v. Savage*, 9 Colo. App. 131; 47 Pac. 902.

In instances, licenses, though money expended thereon, are revocable. *Hathaway v. Yakima Co.* 14 Wash. 469; 44 Pac. 896. *Miser v. O'Shea*, 37 Oreg. 231; 62 Pac. 491.

A license to use water held revocable. *Jensen v. Hunter*, (Cal.) 41 Pac. 14.

Appeal from District Court, Dubuque County.

MATTHEWS, Judge.

Plaintiffs, A. W. Hosford, John Southwell, E. T. Goldthrope, and Anton Trieb, partners under the firm name Alpine Street Zinc Mining Company, bring this action against Matthew W. Metcalf, J. W. Waters, Frank Coals, Sr., H. L. Lundbeck, John Spensley, David Metcalf, and John Alexander, partners under the firm name Avenue Top Mining Company, to enjoin them from mining upon a tract of land known as the "Dillrance Ground."

The plaintiffs claim the exclusive right to mine on said land by virtue of written leases to them from the widow and heirs of J. W. Dillrance, deceased, to whom the same was bequeathed; and the defendants claim the same right by virtue of a grant in parol by said J. W. Dillrance to their grantors. Decree was rendered dismissing the plaintiffs' petition, and for costs, from which they appeal. Affirmed.

CRANE & HOSFORD, for appellants.

Permission to pollute a stream from ore washings, held, a non-assignable license. *Nunnally v. Southern Co.* 94 Tenn. 397; 29 S. W. 361.

Where a party receives a license from the State, to mine phosphate under navigable rivers, neither he nor his bondsmen can dispute its validity. *State v. Seabrook*, 42 S. C. 74; 20 S. E. 58.

The grant of a license to take minerals is not necessarily non-exclusive of the grantors' right though *prima facie* it is non-exclusive. *Duke of Southerland v. Heathcote*, L. R. 3 Ch. 504 (1891).

An option to purchase with privilege to work is a license coupled with an interest. *Hall v. Abraham*, 44 Ore. 477; 75 Pac. 882.

Licensee in such case having made expenditures, the license is irrevocable. *Id.*

Construction of the Missouri Statutory Mining license law. *Ashcraft v. Englewood Co.* 106 Mo. App. 627; 81 S. W. 469.

License by Mining Company to build switch upon the company's

MCCARTHY & KENLINE, for appellees.

GIVEN, C. J. 1. A brief statement of facts about which there is no dispute will make plain the points in controversy:

Mr. J. W. Dillrance owned about one acre in the belt of mineral lands in and near the city of Dubuque. The minerals found in that locality are lead and zinc, the latter consisting in what is called, "Black Jack" and "Dry Bone." These minerals are found in crevices or veins generally running east and west 50 to 200 feet below the surface, and from 50 to 300 feet apart. On the land immediately north of the Dillrance tract is a crevice called "Avenue Top Crevice," and on the Dillrance land one called the "Black Crevice." About the year 1875 McNulty, Burt & Co. procured mining privileges on the land north of the Dillrance land, and sunk a shaft to the Avenue Top crevice, from the bottom of which shaft they mined east and west along the crevice to a considerable distance. Wishing to prospect the land of Mr. Dillrance, and to mine the same if minerals were found in paying quantities, they secured from Mr. Dillrance verbal permission to do so, on certain conditions as to payment of royalty, etc. Having this permission, they proceeded at large expense, and drove an entry from a point in their mine east of the shaft, south 300 feet, to the Black crevice on the Dillrance land.

ground made without consideration is revocable. *Stratton's Independence v. Midland Terminal Co.* 32 Colo. 493; 77 Pac. 247.

Under the Missouri Mine License Act the owner may require the licensee to register; but if he permits him to go to work without registering he cannot forfeit his right without giving him opportunity to register later. *Currey v. Harden*, — Mo. App. —; 83 S. W. 770.

Permission to construct a pipe-line held revocable by heirs after decease of their ancestor, the grantor. Acquiescence in its construction is not an estoppel. *Pioneer Co. v. Shamblin*, 140 Ala. 486; 37 So. 391.

It is fixed by repeated decisions in Illinois that a parol license to mine is revocable although expenditures have been made on the faith of it. *Entwhistle v. Henke*, 211 Ill. 273; 71 N. E. 990.

There is some controversy as to the extent that mining was carried forward on the Dillrance land through this entry. The defendants claim to have succeeded to the rights of McNulty, Burt & Co. in their mine, and to prospect and mine on the Dillrance land, through a succession of transfers. We will not inquire as to each of these transfers. It is sufficient to say that under them these defendants have whatever rights McNulty, Burt & Co. would have that were transferable.

II. Appellants' first contention is that the right granted to McNulty, Burt & Co. was to mine for lead ore only, not for zinc ores. It appears that at the time the entry was driven south to the Black crevice there was no demand for the zinc ores, and that the mining in that region was then being prosecuted for lead ore only. Appellants insist that for this reason lead ore only was contemplated by the parties. The utility of Black Jack and Dry Bone for the manufacture of zinc was known, but the price did not then warrant mining these ores; but in time the demand increased, the price went up, and zinc ores were mined as long as the price rendered it profitable, and thus it was abandoned and resumed as the market warranted. Only zinc ores were found in the Black crevice, and, as those ores were not mined therefrom for some years after the crevice was struck, plaintiffs insist that only lead ore was contemplated. The state of the market explains why mining zinc ores was suspended and resumed from time to time. We are satisfied that both Mr. Dillrance and McNulty, Burt & Co. contemplated the mining of zinc ores, as well as lead, under this permission.

III. Appellants' next contention is that the parol license to McNulty, Burt & Co. was a personal privilege founded in personal trust and confidence, and therefore not transferable, and that an attempt to transfer the same forfeited the privilege. While this is true as to merely personal privileges, we think, in view of the facts, that this license to prospect and mine became more than a mere personal privilege. In this

case the licensees had, under the license, and with the knowledge and consent of the licensor, expended largely labor and money. This being so, the licensor could not revoke the license without refunding the expenditure, and in such case the licensee "would have such an interest in real estate as would entitle him to bring an action in this form [ejectment] to recover it." *Beatty v. Gregory*, 17 Iowa, 109; *Upton v. Brazier*, 17 Iowa, 153; *Bush v. Sullivan*, 3 Greene, 344; *Harkness v. Burton*, 39 Iowa, 101. It is a recognized rule that ejectment may be maintained for corporeal, but not for incorporeal, hereditaments. *Beatty v. Gregory*, *supra*. In that case it is held that, the licensee having expended labor and money under his license, his interest was such an interest in real estate as entitled him to bring ejectment. In *Dark v. Johnston*, 55 Pa. 164, cited by appellants, the license was to prospect for and take oil; and the court holding that this passed no property in the oil until reduced to possession, held that ejectment would not lie. The court said: "There is a manifest difference between the grant of all the coal or ore within a tract of land, or even the grant of an exclusive right to dig, take, and carry away all the coal in the tract, which we held in *Caldwell v. Fulton*, 31 Pa. 475, to be a grant of corporeal interest, and a grant of the waters in or on the tract. The nature of the subject has much to do with the rights that are given over it, and to us it appears that the right to take all the oil that may be found in a tract of land cannot be a corporeal right." It is further said in that case: "It has been held in this state that even a parol license executed may become an easement upon the land, and that, when acts have been done by one party in reliance upon a license granted to another, the latter will be equitably estopped from revoking it to the injury of the former." We need not cite further authorities to show that under the facts *McNulty, Burt & Co.* became possessed of more than a mere personal privilege. They became possessed of an interest in the real

estate; a corporeal hereditament; a license of which they could not be deprived without compensation. In *Mendenhall v. Klinck*, 51 N. Y. 246, cited by appellants, a license was given to prospect for oil, with the right to elect to take the land upon certain terms if oil was found thereon. The party never elected to take the land, and the court held that: "Until they should elect, they had no interest in the lands. They had a mere license to go upon the lands, with the right of election. This license extended only to them and their agents. They could not sell or assign it." It appears in that case that the party not only failed to make an election, but failed to prospect the land. Say that this license was to an individual who died while in the exercise of the privilege; would it be claimed that the privilege died with him, that his estate had no interest in it, and that his expenditures were forfeited? Surely not, because by reason of his expenditures the privilege had become more than a mere personal privilege. It had become a property interest,—an interest that would pass to his estate, or which his creditors might pursue. If the interest of McNulty, Burt & Co. had by reason of the facts become more than a personal privilege,—had become an interest in property, a corporeal hereditament,—then surely it might be transferred.

IV. Appellants' next contention is that the prosecution of the privilege given to McNulty, Burt & Co. was long since abandoned, and therefore operated to revoke the license. No time being given within which the privilege might be exercised, it would continue for a reasonable time, and what would be a reasonable time must be determined by the circumstances. It is claimed that, because mining in the Black crevice was not prosecuted for several years after that crevice was reached, there was an abandonment of the privilege. We have seen that the reason why mining was not prosecuted in that crevice was because there was not sufficient demand for the mineral in that crevice to justify mining it. The evi-

dence shows that this entry to the Black crevice was not abandoned, but at different times was entered, and more or less work done in it, and that mining in that crevice was resumed whenever the demand justified it. Mr. Dillrance seems to have been satisfied with what was being done, as he never treated the privilege as abandoned. Appellees insist that no forfeiture was pleaded, and therefore it cannot be considered; but, as we find that no forfeiture in fact took place, we need not consider this contention.

V. Appellants contend that under the facts this case comes within the principle announced in *Bush v. Sullivan, supra*, and that as McNulty, Burt & Co. failed to find the mineral for which they were searching, namely, lead ore, in the Black crevice, and ceased to work in that crevice, Mr. Dillrance had the right to take possession. The answer to this contention is that McNulty, Burt & Co. did not abandon the right to mine in that crevice, and that Mr. Dillrance did not withdraw the privilege or take possession. The further claim of appellants that the rights granted by Mr. Dillrance were, by operation of law, terminated by his death in September, 1891, is not well founded; for, as we have seen, the privilege granted had ripened into more than a mere personal privilege. It had become a property right and could only be terminated on reasonable notice, and upon compensation made.

VI. Appellants insist that, if we find as we have, the judgment below should be modified, an accounting had as to the expenditures of the defendants under this license, and plaintiffs permitted to terminate the license by paying the defendants for their outlay. The defendants having an existing, exclusive right to mine that land, plaintiffs took nothing by their lease, as against them, and are not entitled to terminate the defendants' privilege by making compensation. What we have said fully disposes of the questions discussed, and leads us to the conclusion that the decree of the district court is correct, and it is therefore affirmed.

J. R. EATON V. T. R. NORRIS ET AL.

(131 California 561; 63 Pac. 856. Supreme Court. February 12, 1901.)

Facts of the case. Sufficient staking and posting. Two adjoining mining claims were each marked at the corners by four stakes about a foot and a half long, flattened on two sides, and driven into the ground about four inches, two stakes being at the ends of the dividing line common to both claims. In the middle of the dividing line was a tree blazed on both sides, on one of which the notices of location were posted, describing the claims by courses and distances, running from the tree to a stake, and from stake to stake to point of beginning. The ledge on each claim had been sufficiently developed to show its existence and direction. *Held*, that the location sufficiently complied with R. S. U. S., § 2324, requiring that a location must be distinctly marked on the ground, so that its boundaries can be readily traced.

Where there is neither statute nor district rule the validity of a location depends entirely upon whether it complies with the requirements of Section 2324, the Congressional Act.

The ultimate fact of location. Whether it has been sufficiently marked on the ground is for the jury or the trial court. But if there be a finding of specific facts to necessarily show such sufficient marking a general finding of location not made, must be disregarded.

All that the statute requires is that the claims be marked distinctly on the ground without regard to the mode.

Continued possession of the ground staked and actual knowledge by the later contesting parties "in some degree" supports the proof of location.

¹Boundaries must be marked—sufficiency of marking may depend on nature of ground. Stakes and stone corners are sufficient. *Book v. Justice Co.* 17 M. R. 617.

Staking is an essential act of location in New Mexico. *Deeney v. Mineral Co.* 67 Pac. 724; 22 M. R. —.

Parol testimony admissible to show permanency of monuments. *Metcalf v. Prescott*, 16 M. R. 137.

Stakes need not necessarily be marked with the name of the Lode. Facts of the case, held to make a good location. *Smith v. Newell*, 86 Fed. 56.

²*Brown v. Oregon King Co.* 21 M. R. 485.

Omission to establish center-end post and failure to verify location

Commissioners' decision. Department 1. Appeal from Superior Court, Siskiyou County; J. S. BEARD, Judge.

Action by J. R. Eaton against T. R. Norris and others. From a judgment for plaintiff, defendants appeal. Affirmed.

WARREN & TAYLOR, for appellants.

GILLIS & TAPSCOTT, for respondent.

SMITH, C. An appeal from a judgment against the defendants and from an order denying a new trial. The suit was to quiet title to two mining claims particularly described, and known as the Luella quartz-mining claim and the Extension of the same. The former claim was located January 1, 1896, by the plaintiff; the latter by his wife, who conveyed to him prior to the beginning of the suit, he conveying to her an undivided half of his original claim. The defendants claim under a later location, of date January 15, 1898; and their location, being subsequent to the act of March 27, 1897, "prescribing the manner of locating mining claims" (St. 1897, p. 214), must depend for its validity on compliance with the provisions of that act, with which the court found they failed to comply. As conclusions of law the court found that the defendants' location was void, and that the plaintiff, being in possession, was entitled to judgment against them as mere trespassers. It is now urged by the appellants that their location was valid, and the findings to the contrary unsupported by the evidence. But the first question to be determined is as to the validity of the plaintiff's location; for,

certificate, held to defeat the location. *Wright v. Lyons*, — Oreg. —; 77 Pac. 81.

State statute requiring the marking of the center-end lines and the verification of the location certificate is not in conflict with the United States Mining Acts, §§ 2319, 2322, 2324. *Id.*

if this was valid, the claims were not open to location by the defendants.

The plaintiff's locations, being anterior to the act of March 27, 1897, and there being in this case no local usage or customs, must be governed, with regard to their validity, exclusively by the provisions of chapter 6 of title 32 of the Revised Statutes of the United States, and especially by those of section 2324 (Rev. St. p. 426); the sole requirement of which is that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." The court finds specifically how the locations were in fact marked on the ground, but does not find in words that the marks found were such that the boundaries could "be readily traced;" and it is objected that, in the absence of such a finding, the judgment cannot be sustained.

It is, no doubt, true that the ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or—to use the language of the statute—of such a character that the boundaries can be readily traced; and that it is for the jury, or court sitting as a jury, to determine whether this has been effected. 1 Lindl. Mines, p. 483, § 373; *Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594; *Anderson v. Black*, 70 Cal. 230, 11 Pac. 700. But where specific facts are found, "from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient as the finding of the ultimate fact." Hence, if the marks of location as found by the court are of such a character that it is evident that the boundaries can be readily traced, the finding will be sufficient; and in such a case, if there be, in addition to the special findings, a general finding to the contrary, the findings will be set aside as conflicting,—as was in fact done in a case involving the validity of mining locations, where it was found that "said locations were not distinctly marked on the ground, so that their boundaries could be readily traced." *Howeth v. Sullenger*, 113 Cal.

549, 45 Pac. 841. The question to be considered, therefore, is whether in this case the marking of the location as found was sufficient. And in considering this question it will be observed we are not confined to the monuments placed at the corners of the claim at the inception of the location for the purpose of marking it, but may consider also all other objects placed on the ground, either then or subsequently, prior to the defendants' location, either for the purpose of serving as monuments or otherwise; for all that the statute requires is that the claims be marked distinctly on the ground, without regard to the mode.

The two claims of the plaintiff, it appears from the findings, adjoin each other; the Extension being north of the Luella claim. They were each marked at the corners by four oak stakes, about a foot and a half in length, flattened on two sides, and driven into the ground four or five inches; two of the stakes being at the ends of the dividing line, and common to both claims. Some of the stakes were in the brush, others in the open ground. In the middle of the dividing line was an oak tree, blazed by the plaintiff on two sides, on which the notices of location were posted. In these the two claims were described respectively by courses and distances, running from the tree to a stake, and from stake to stake to the point of beginning. The quartz ledge had been previously discovered, and work had been done in developing it on both claims. The plaintiff also opened up and uncovered the ledge a considerable distance from the tree each way. Subsequently the ledge was further developed by three different cuts sunk deep in the rock, aggregating together over 80 feet in length. A house was built on the Luella claim, near the common boundary of the two claims, in which the plaintiff's men were living.

This, I think, was sufficient, under the most stringent construction of the law (*Southern Cross M. Co. v. Europa M. Co.*, 15 Nev. 383); and, indeed, the case seems to come di-

rectly within the authority of *Howeth v. Sullenger*, 113 Cal. 548, 549, 45 Pac. 841, cited *supra*.

Stakes driven in the ground are, in the absence of convenient natural objects, the most common means of marking a tract of land, and "the most certain means of identification." *Hammer v. Milling Co.*, 130 U. S. 299; 1 Lindl. Mines, p. 483, § 373. It may be that the marking of the claim by substantial stakes at four corners will not be of itself sufficient (*Taylor v. Middleton*, 67 Cal. 656, 8 Pac. 594), but here it is found that some of the stakes were in the open ground, and, as the ledge had been sufficiently developed to show its existence and direction, the boundaries of the claim could be readily traced from these. Both claims were also marked by the blazed oak, and from that alone the boundaries as given in the notice could be readily traced. The posted notices, it is said, cannot be substituted for the marking, but they "may be an aid in determining the situs of the monuments." 1 Lindl. Mines, p. 483, § 373. They therefore constitute a part of the marking, as does every other object placed on the ground for the purpose of marking it or otherwise, if it in fact does help to mark it. It may, indeed, on account of its temporary nature, be, in general, of minor significance; but this is not so where the location is followed by the actual and continued working of the claim. *Jupiter M. Co. v. Bodie M. Co.*, 11 Fed. 666. I think, therefore, that the plaintiff's locations were good, and the findings sufficient.

This conclusion is also, in some degree, supported by other findings of the court, which are "that defendants were knowing to the above facts, and recognized the existence of said claims, but claimed that a sufficient amount of assessment work had not been performed by the plaintiff"; and that one of them "had been watching the plaintiff during the summer of 1897, to see if he did the required amount of assessment work on his claims." It appears, therefore, that the location

was at least sufficient to satisfy the defendants, who alone are adversely interested, and that it thus effected the full purpose contemplated by the act.

I advise that the judgment and order appealed from be affirmed.

HAYNES, C., and GRAY, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

GOROUTTE, J., VAN DYKE, J., HARRISON, J.

LEWIS WRIGHT V. F. G. KILLIAN ET AL.

(132 California 56; 64 Pac. 98. Supreme Court. February 27, 1901.)

An admission that plaintiff was owner of a mining claim at a certain time is an implied admission that he had performed his annual labor.

¹Good faith and payment. Plaintiff paid \$400 for the annual labor on four claims, but the amount of development produced for this sum seemed small. The payment being made in good faith and the finding of the trial court being that the labor was performed the appellate court upholds the finding.

All local circumstances to be considered. Considering the remoteness of the mines from any place where labor was readily procurable, the difficulty of procuring wood and water and all like surrounding circumstances are to be kept in view in determining the value of the expenditure.

²A district rule fixing so many feet of sinking as full assessment work is not binding to allow of less expenditure than the Act of Congress requires, but is evidence tending to show what the miners considered to be the value of labor in that locality.

Where there was no failure on the part of the original locators to perform the labor the regularity of the relocation becomes wholly immaterial.

Commissioners' decision. Department 2. Appeal from Superior Court, San Bernardino County; FRANK F. OSTER, Judge.

¹Proof of failure to perform must be clear. *Crown Point Co. v. Crismon*, 21 M. R. 406. *Emerson v. McWhirter*, 21 M. R. 470.

²As to the power of mining districts to regulate labor see *Northmore v. Simmons*, 20 M. R. 128 and notes.

If the work was done proof of payment is not essential to make it good. *Coleman v. Curtis*, 12 Mont. 301; 30 Pac. 266. *Lockhart v. Rollins*, 16 M. R. 16.

The owner commenced work December 26th and worked until Saturday night, December 30th, resumed work Monday morning and completed \$500 worth. The relocater began work after midnight, December 31st. *Held*, that the original owner had resumed work and that the relocation was void. *Fee v. Durham*, 121 Fed. 468.

Action by Lewis Wright against F. G. Killian and others to quiet title to certain mining claims. From a judgment in favor of the plaintiff, and from an order denying a motion for a new trial, the defendants appeal. Affirmed.

ROLFE & ROLFE, and F. B. DALEY, for appellants.

LEONARD & MORRIS, and J. M. WALLING, for respondent.

CHIPMAN, C. Action to quiet title to certain four mining claims and for an injunction. Plaintiff had judgment. The appeal is from an order denying defendants' motion for a new trial.

The verified complaint alleged ownership and right of possession of the mining locations in question for more than five years prior thereto; that defendants entered upon the property on January 1, 1899, and thereafter extracted and are now extracting ore therefrom; and that they claim some interest in and to the said mining locations. Defendants answered, denying the ownership of plaintiff "at the commencement of the action or at any time on or after the 1st day of January, 1899;" alleged that plaintiff failed to do work on each of said locations of the value of \$100 during the year 1898, and that he therefore forfeited any interest he might have had therein; that for more than three years prior to January 1, 1899, defendant "had known of the

Although defendants paid more than \$100 for the work performed it does not count if the work performed was of the value of less than \$100. *Wagner v. Dorris*, 43 Ore. 392; 73 Pac. 318.

A party made a new location over an older claim which he afterwards purchased. *Held*, that the work done on the new location could be treated as annual labor for the protection of the older title. *Johnson v. Young*, 18 Colo. 630.

Annual labor done with the company's money enures to its benefit though contract under which it was done held in the name of the superintendent. *Godfrey v. Faust*, — So. Dak. —; 101 N. W. 718.

mining claims mentioned in said complaint, and of the gold-bearing veins or lodes thereon;" that, knowing plaintiff had forfeited his rights by failure to do the requisite assessment work, they "entered upon the premises * * * on said 1st day of January, 1899, * * * for the purposes of locating and in good faith working and developing the ores," etc., and erected substantial monuments and posted notices, and within 20 days thereafter recorded the same in the county recorder's office.

The court found that "each and all of the averments of the complainant are true;" that plaintiff, during the year 1898, performed, and caused to be performed, upon each of said mining claims, * * * not less than one hundred dollars' worth of work and labor in the development and improvement of each of said claims." The court found in detail, the acts and things done by defendants constituting their location of the property, setting forth copies of their notices, but the court found that said notices made no reference to any natural objects or permanent monuments in existence, sufficient to identify any of said locations, and that the monument erected by defendants on each of said claims was not erected at any point of discovery thereon, nor upon any gold-bearing ledge, vein, or lode of rock in place bearing any mineral deposits or precious metals.

As conclusions of law, the court found that plaintiff is the owner, and that defendants had no right in or to any of the claims, and that defendants be perpetually enjoined from working the mines. Judgment was accordingly entered.

1. It is contended that the evidence does not support the finding that plaintiff performed, or caused to be performed, \$100 worth of work on each claim during the year 1898.

This is the principal question in the case. The answer, by its form of denial, admits that on December 31, 1898, and for five years prior thereto, plaintiff was the owner of the mining claims in question, but it is alleged in the answer

that plaintiff forfeited his interest by failure to do the requisite assessment work for 1898. An admission of ownership would imply that plaintiff had done whatever was necessary to constitute ownership, including assessment work. The parties, however, seem to have treated this admission (which was also made in open court when the trial began) as simply establishing a prima facie case for plaintiff, and as casting the burden on defendants of proving the alleged forfeiture, and they at once assumed the burden, and put in their evidence on that issue.

The provisions of section 2324, Rev. St. U. S., which relate to questions involved in the pleadings, including that relating to the labor required, are as follows: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the names of the locators, the date of the location, and such description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * And upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, * * * their representatives, have not resumed work upon the claim after failure and before such location."

It appears without conflict that one Greenleaf was employed by plaintiff to do the requisite assessment work on each of the four claims, and that he was paid \$400 by plaintiff therefor. The claims are about 50 miles from any railroad station, and 120 miles from San Bernardino, whence Greenleaf went with a team and five men to do the proposed work. He testified that he thought it necessary to take men from San Bernardino, because he was not sure of finding them near the mine. All these men, together with Greenleaf, worked more or less days, and excavated a shaft on each claim of dimensions, as Greenleaf testified, of about 4½ feet by 6 feet, and about 12 feet deep. The character of the ground through which they sunk the several shafts varied somewhat in the different claims, but it required blasting, and was what would be called hard ground to work, and Greenleaf testified that the work performed by him on each claim was reasonably worth \$100 and more. In this estimate he was corroborated by several witnesses who were qualified to judge of the value of the work, and who examined the shafts and the ground, and also by two of the men who helped do the work.

The evidence was that Greenleaf fitted out the party with tools, forge, powder, fuse, and other supplies and a team; that he supervised the work, as well as did some part of it with his own hands; that he was familiar with the value of that class of work, and had done much similar work in that mining district. Defendants offered in evidence the recorded affidavit of one Phelps, who had helped do the work and made the proof of labor on behalf of plaintiff, and this affidavit stated that at least \$100 worth of labor and improvements was performed and made on each of the claims. It was in evidence, without objection, that the miners in that mining district had adopted and caused to be recorded in the office of the county recorder the rules and by-laws of the district. Among those who organized the district were two of

the present defendants, and among the rules adopted was article 6, "that a shaft 4 ft. in width, 6 ft. in length, and 10 ft. deep, or its equivalent in cubic feet, shall be excavated in each claim, and this shall constitute the regular assessment work of the district."

It appears, however, that the wages in the district generally was \$3 per day for a man where he boarded himself, or \$2 when board was furnished, the employer to furnish tools, powder, etc., in both cases; that the shaft dug on each claim could be done by one man in 15 to 18 days, and the wages actually paid by Greenleaf to his men did not exceed these figures. Estimates by witnesses for the defense showed that the supplies, tools, team used, and other items of expense, added to the cost for wages, could not have reasonably amounted to \$100 for each location. It is claimed that there is, in no true sense, any conflict in the evidence, because it clearly appears that the witness who estimated the value at \$100 could not give in detail the items aggregating so great a sum for the work actually done. There is no question but that plaintiff paid Greenleaf in good faith the full amount of \$400. It is fair to infer from the evidence that Greenleaf did work which he believed sufficiently complied with the law, and was of the value of \$100. There is nothing in the evidence justifying the inference that there was any intention to evade the law or come short of its requirements by plaintiff or by the men whom he employed to do the work. Considering all the circumstances under which he undertook the work; the remoteness of the mines from any place where labor could be relied on as available; the extra cost of supplies; the inconvenience in procuring wood and water, requiring a team to be kept there; the lack of facilities for cooking and other like circumstances,—it may be doubted whether there was any profit to Greenleaf, notwithstanding all that appears as to the cost of the various items of expense.

But, even if he made some profit, there is evidence, substantial, direct, and credible, that the labor performed on each claim was worth \$100, and we cannot take from the trial court, in such a case as appeared here, the right to determine from all the evidence the ultimate fact of the value of the work performed, nor can we say there was no substantial conflict in the evidence. The facts brought out by defendants tended strongly to weaken the evidence adduced by plaintiff, but it did not destroy it utterly, and leave the facts without conflict. The good faith of plaintiff was further shown, in this: That he had sold the mines conditionally, and the deeds were in escrow, and he had employed Greenleaf to go with the representatives of the proposed purchasers and examine the property after the assessment work was done. They went, and some of them were there on December 31st, taking samples of ore, and returned the next day (Sunday), January 1st, to continue their examination and development work, and then found that during the intervening night, at the hour of 12 o'clock and 10 minutes, defendants had "jumped" the claims, and had tied the tools together that they found at one of the claims, and attached a notice thereto, "saying, 'Remove Tools,' signed by Jack Killian," one of the defendants. They thereupon left the mines, being unwilling to purchase a lawsuit, and shortly after plaintiff brought this action.

It is no doubt true, as appellants contend, that the provision of the law as to assessment work is often evaded, and that, as this court has said, "the conditions imposed by the act of congress are wise and salutary, and are by no means onerous" (*Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643), and must be complied with (*Id.*); but there is disclosed here no effort or intention to avoid the provisions of the law. The trial judge had the witnesses before him, and all the peculiar circumstances surrounding the parties must have received

consideration. The by-law above referred to could not dispense with the requirements of the statute, but it tended to show how miners regarded the general character of the mining ground in that district, and what amount of work in their judgment would be worth \$100; and it also tended in some degree to rebut any inference of bad faith in stopping the work in a shaft after it had been sunk 12 feet of the required dimensions, even though it cost less than \$100. We think there was sufficient evidence to support the finding.

2. The fourth finding, as to the want of knowledge of defendants concerning the presence of gold-bearing veins, is not material. Conceding that the proceedings taken by them to relocate the claims were all regular, they could confer no right, inasmuch as plaintiff had not forfeited his right.

The same may be said as to finding 7, that defendants' notices did not refer to any natural objects or permanent monuments sufficient to identify their locations, and that the locations were not distinctly marked on the ground so that their boundaries could be readily traced. Findings upon these matters, and as to whether defendants complied with the act of 1897 (since repealed, but then in force), become immaterial, and, if not supported by evidence, were without injury.

3. Numerous exceptions to rulings of the court in admitting and rejecting testimony were taken by defendants, but few of which, however, are referred to in their brief.

We have examined the record at the points indicated, and, while we think in one or two instances the rulings should have been the other way, they were not prejudicial to defendants. The essential facts came out quite fully on both sides, and we can discover no instance where evidence was admitted or excluded over defendants' objection to their injury.

It is advised that the order be affirmed.

HAYNES, C., and COOPER, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

HENSHAW, J., TEMPLE, J., MCFARLAND, J.

GEYSER-MARION GOLD MINING COMPANY V. CHARLES B. STARK.

(106 Federal 558. Circuit Court of Appeals, Eighth Circuit. March 11, 1901.)

Corporation must use diligence to prevent unauthorized transfers of stock. It is the duty of every corporation to use reasonable diligence in each case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make transfers so authorized, and to prevent those unauthorized; and for every breach of this duty it is liable to the injured party for the damage it inflicts.

The legal presumption is that a trustee has no power to sell or transfer the subject of his trust.

¹The word "trustee" carries notice. A corporate record and certificate of ownership of stock by A. B., trustee, is notice to the corporation that he holds it, without the power of disposition, for some *cestui que* trust.

It is actionable negligence for the corporation to cancel the certificate and transfer the stock on the signature of the trustee to the assignment, without any inquiry for the *cestui que* trust, or for his assent to the transfer.

Local custom violative of law inoperative. A local custom of dealers in a place where a sale is made, which violates a well-established principle of law, and changes the nature and obligations of the relation of two parties to each other, is inoperative unless known and assented to by both.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Utah.

¹The word, trustee, in a promissory note does not destroy its negotiability. *Ashton v. Atlantic Bank*, 3 Allen 217; *Fox v. Citizens Bank*, (Tenn.) 37 S. W. 1102; 35 L. R. A. 678 and notes.

The president of a company obtaining a mining lease in his own name based on prospecting done at the expense of the corporation must hold the same as trustee for his company. *DeBardleben v. Bessemer Co.* 140 Ala. 621; 37 So. 511. See *Lagarde v. Anniston Co.* 20 M. R. 545.

This was a suit in equity brought by the appellee, Charles B. Stark, against the appellant, the Geyser-Marion Gold-Mining Company, a corporation of the state of Utah, to compel it to either re-instate upon its records the registry of his ownership of 3,000 shares of its stock, or to pay to him the value of that stock, which the appellee alleged the corporation had negligently permitted to be transferred upon its records to third parties. The appellant answered that the stock in question stood upon its books in the name of Felix J. Stark, trustee; that, pursuant to a custom which existed in Salt Lake City, this trustee sold and assigned the stock to third parties, who surrendered the certificates to the corporation, and thereupon the appellant issued new certificates of stock to these purchasers, and registered the ownership thereof in their names, without any notice that the complainant was interested therein. At the close of the hearing these facts were established: Charles B. Stark was a resident of St. Louis, Mo. Felix J. Stark, his brother, resided in Salt Lake City, in the state of Utah. In 1897 and 1898 Felix J. Stark bought for Charles B. Stark 3,000 shares of the stock of the appellant. A certificate for 1,000 of these shares was issued in the name of Charles B. Stark, who subsequently assigned it in blank, or signed a power of attorney authorizing Felix J. Stark to transfer it, and delivered the certificate to him. Thereupon Felix surrendered the certificate for these 1,000 shares to the corporation, and at his request the corporation issued a new certificate for these shares to Felix J. Stark, trustee, and so recorded the ownership upon its books. The certificates for the remaining 2,000 shares, when purchased, were assigned either in blank or to Felix J. Stark, and were delivered to him. He surrendered them to the corporation, and at his request the corporation cancelled them, and issued and delivered to Felix J. Stark, trustee, new certificates for these 2,000 shares, and recorded the ownership thereof in his name as trustee upon its books. Felix J. Stark had no beneficial interest in any of this stock. The appellee, Charles B. Stark, was the equitable and beneficial owner thereof, and Felix J. Stark held it as his trustee. The appellee pursued the course indicated by these facts for the purpose of enabling him to direct his trustee to sell and transfer his stock at any time by wire, without waiting to forward the certificates from St. Louis. The appellee never did authorize his trustee, Felix, to sell or transfer the stock. But Felix J. Stark sold and assigned this stock, by means of the signature, "Felix J. Stark, Trustee," to third parties, and appropriated the proceeds of the sale to his own use, without the knowledge of the appellee. Thereupon the purchasers presented the certificates for these 3,000 shares of stock, with the assignments thereof, signed by Felix J. Stark, trustee, and surrendered them to the corporation. The mining company accepted the

surrender, canceled the certificates, issued new certificates for like amounts to these purchasers, canceled the registry in its books of the ownership of this stock by Felix J. Stark, trustee, and recorded its ownership by the purchasers. At the time of these transactions Felix J. Stark was a broker, and a member of the Stock Exchange of Salt Lake City, and it was a custom in that city for brokers to carry in their names, as trustees, stock belonging to third parties, which was extensively bought and sold without any actual transfer of the certificates of stock; the brokers holding them in their possession and in their names as trustees, and accounting to the respective purchasers. It was also the custom for such brokers to transfer and assign the stock by signing the assignments with their names as trustees, without the signatures of the *cestuis que trustent*. The appellant had no knowledge of the beneficial ownership of this stock by the appellee, and no actual notice of his interest in it. Upon this state of facts the court below found that the appellee was entitled to recover from the mining company the damages which he had sustained by the transfer and loss of his stock. It found these damages to be \$2,851.22, and entered a decree accordingly. The mining company has appealed from this decree.

J. E. FRICK (H. C. EDWARDS, on the brief), for appellant.

JOHN W. JUDD, HARRISON O. SHEPARD (CHARLES B. STARK, R. B. SHEPARD and ALLEN T. SANFORD, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Corporations issue certificates of the ownership of their stock. They condition the rights of their stockholders to vote, to participate in their management, and to receive dividends upon their stock, upon a registry of their ownership of their shares in the corporate books and upon these certificates. They make the certificates and keep the registries, and they thereby assume an obligation to each stock-

holder to use reasonable diligence to certify, and to make their records declare the truth. No man can be lawfully deprived of his property without his consent except by due process of law, and, if he once becomes the owner of stock in a corporation, that association cannot recklessly deprive him of that ownership, and confer it upon another, without liability for the damages it causes. It is bound to use reasonable diligence in every case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make those transfers that are so authorized, and to prevent those that are unauthorized; and for every breach of this obligation it is legally liable to the parties injured for the damage it thus inflicts. *Telegraph Co. v. Davenport*, 97 U. S. 369, 371, 372, 24 L. Ed. 1047; *Cook, Stock, Stockh. & Corp. Law*, § 327; *St. Romes v. Cotton-Press Co.*, 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289; *Loring v. Salisbury Mills*, 125 Mass. 138; *Same v. Frue*, 104 U. S. 223, 26 L. Ed. 713; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Pratt v. Manufacturing Co.*, 123 Mass. 110; *Pennsylvania R. Co.'s Appeal*, 86 Pa. 80.

At the time of the transfer of this stock of which complaint is here made, the appellee was its equitable owner; and Felix J. Stark, his brother, held the title to it in trust for his benefit, with no authority to sell or to transfer it. The certificates which represented it and the corporate books alike declared, not that Felix J. Stark, but that Felix J. Stark, trustee, held the title to it. Felix violated his trust. He signed the name "Felix J. Stark, Trustee," on the assignments of the certificates without any authority from his *cestui que trust* to either sell or assign them, and he delivered them to the purchasers. For these acts the corporation was not liable. After their performance the stock still stood of record in the name of Felix J. Stark, trustee; and the appellee, the *cestui que trust*, still had the right to direct the action of the trustee, to dictate his vote in the management of the

affairs of the corporation, to receive the dividends on the stock, and to control its disposition. But when the corporation accepted unauthorized assignments of the trustee, canceled the certificates, issued new certificates for the same shares of stock, which declared the purchasers to be their owners, and recorded the ownership of this stock upon its corporate books in the purchasers, instead of in Felix J. Stark, trustee, the appellee's stock was gone, and he was deprived of all his legal and equitable rights therein. Was the corporation liable to him for this loss? Counsel for the appellant maintain that this question should be answered in the negative (1) because the addition of the word "trustee" to the name Felix J. Stark gave the corporation no notice that this stock was held in trust for any one, and imposed upon it no duty to inquire concerning the *cestui que trust*; (2) because the appellee is estopped by the fact that before the title of the stock was recorded in Felix J. Stark, trustee, he permitted assignments thereof to be made to Felix individually, and gave him possession and control of the certificates; (3) because it was the custom of stockbrokers in Salt Lake City to hold the title to stock in their names as trustees, and to assign and transfer it without the consent of their *cestuis que trustent*, and (4) because the stock had been assigned to the purchasers by Felix J. Stark, trustee, and this assignment had vested in them a perfect title, so that the subsequent transfer thereof on the corporate books, the surrender of the old certificates, and the issue of new certificates to the purchasers, inflicted no injury upon the appellee.

But the word "trustee" means something. It is a warning and declaration to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; and (3) that he has no right or power to sell or dispose of it without the assent of his *cestui que trust*. It denies the equitable ownership and beneficial interest of the party to whom it is

applied, and asserts that he holds it in a representative capacity. It signifies the opposite of the word "owner," and means that, while the party called "trustee" has the naked legal title, he has no beneficial right, title, or interest in the property. No one who should read in stock certificates or in corporate records that one share was owned by Felix J. Stark, while another was owned by Felix J. Stark, trustee, would fail to understand that he held the former for himself, and the latter for another. Not only this, but the term "trustee" is a term of administration, and not of sale. A trustee ordinarily holds the property intrusted to his charge to collect the rents, issues, dividends, or profits thereof, and to apply them to some specified use. Brokers, administrators, and executors frequently have the power to dispose of the property intrusted to their charge. Trustees commonly have no such power. Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents. The legal presumption is that a trustee has no power of sale. *Jaudon v. Bank*, 13 Fed. Cas. 376, 379 (No. 7,230); *Gaston v. Bank*, 29 N. J. Eq. 98, 103; *Duncan v. Jaudon*, 15 Wall. 165, 175, 21 L. Ed. 142; *Gerard v. McCormick*, 130 N. Y. 261, 267, 29 N. E. 115; *Allen v. Bank*, 120 U. S. 20, 32. When, therefore, the records of this corporation and the certificates disclosed the fact that this stock was held by Felix J. Stark, trustee, and these certificates were presented for surrender and cancellation, and for the transfer of the stock to third parties, without the authority or assent of the *cestui que trust*, this corporation could not escape notice that Felix held it, not for himself, but for another, and that he had no authority to assign it.

It is said, however, that the term "trustee" gave no indication of the name of the equitable owner, and that this fact relieved the corporation from the discharge of its duty. This corporation was bound to exercise reasonable diligence to ascertain whether or not the equitable owner of this stock had authorized its transfer and to prevent its cancellation and its loss by him if he had given no such authority. The warning and declaration which the word "trustee" bore to this corporation that Felix J. Stark was not the owner, that he held it for another, that he had no power to assign it, were certainly sufficient to put the company upon inquiry for the *cestui que trust*, and for his assent to the surrender and destruction of the certificates. No reasonable man, in the presence of such a warning, and in the honest discharge of such a duty, would fail to investigate; and notice sufficient to put a man of reasonable prudence and intelligence upon inquiry is notice of all the facts which a diligent investigation would develop, or is evidence from which knowledge of those facts may be inferred and found. The mining company asked no questions, made no inquiry, canceled and surrendered the stock of the appellee upon the unauthorized assignments, and issued certificates and made a record of its ownership by others. This was neither the exercise of reasonable diligence, nor of any diligence, to ascertain the beneficial owner of this stock, and to prevent its transfer without his consent; and it was a clear breach of the obligation of the corporation to discharge this duty. The old excuse for this dereliction that the word "trustee" pointed to no one but the trustee himself of whom inquiry could have been made, and that such an inquiry would have been idle, because he who would violate his trust would make false answers, is again presented. Its futility has been often shown, and perhaps nowhere better than by Sir John Romilly, master of the rolls, in *Jones v. Williams*, 24 Beav. 62, where he said:

"With respect to the argument that it was unnecessary to make any inquiry, because it must have led to no results, I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith*, 1 Hare, 55, that a false answer or a reasonable answer given to an inquiry made may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say."

It is no excuse for the failure to make any inquiry that such an investigation, if made, might have failed to develop the truth. *Shaw v. Spencer*, 100 Mass. 382, 390.

The suggestion is made that the bookkeeper of the mining company testified that he remembered that, at the time one lot of stock was transferred to Felix J. Stark as trustee, Felix told him that he was the owner of it, and that it was put in his name as trustee, and in smaller certificates, for the convenience of selling it. But this evidence clearly shows that this statement was not made at the time when the stock was transferred from Stark, trustee, to the purchasers, and that it was not made in response to any inquiry made by the corporation for the *cestui que trust*, in the discharge of the duty then incumbent upon it. The result is that the appellant was guilty of negligence in canceling the certificates of the appellee's stock, and certifying and recording its ownership by others, without making any inquiry to ascertain for whom the trustee held it, and whether or not the *cestui que trust* had authorized its disposition. A corporate record and certificate of ownership of stock by A. B., trustee, is notice to the corporation that he holds it, without the power of disposition, for some *cestui que trust*; and it is actionable negligence for the corporation to cancel the certificate and transfer the stock on the signature of the trustee to the assignment, without any inquiry for the *cestui que trust*, or for his assent

to the transfer. *Shaw v. Spencer*, 100 Mass. 382, 389; *Sturtevant v. Jàques*, 14 Allen, 523; *Fisher v. Brown*, 104 Mass. 259, 261; *Duncan v. Jaudon*, 15 Wall. 165, 176; *Central Nat. Bank v. Connecticut Ins. Co.*, 104 U. S. 54; *Welles v. Larrabee*, 36 Fed. 866, 870, 871; *Bank v. Parson*, 54 Minn. 56, 63, 55 N. W. 825; *Gaston v. Bank*, 29 N. J. Eq. 98, 102; *Bundy v. Town of Monticello*, 84 Ind. 119, 130; *Gerard v. McCormick*, 130 N. Y. 261, 267, 29 N. E. 115; *Bailey v. Finch*, L. R. 7 Q. B. 34; *Pannell v. Hurley*, 2 Colly. 241; *Duggan v. Agency Co.*, 30 Am. & Eng. Corp. Cas. 89, 95; *Sweeny v. Bank*, 12 Can. Sup. Ct. 661, 668; *Bank v. Lange*, 51 Md. 138, 144; *Swift v. Williams*, 68 Md. 236, 256, 11 Atl. 835; *Marbury v. Ehlen*, 72 Md. 206, 216, 19 Atl. 648; Lowell, Stocks, § 69; Mor. Priv. Corp. §§ 181, 184; Cook, Stock & Corp. Law, §§ 325, 327. There are three early decisions which repudiate this declaration of the law. They are *Brewster v. Sime*, 42 Cal. 139, 145 (decided in 1871); *Thompson v. Toland*, 48 Cal. 99, 113 (decided in 1874); and *Albert v. Mayor*, etc., 2 Md. 159, 171 (a decision rendered in 1852, which has been overruled by the supreme court of Maryland in *Marbury v. Ehlen*, 72 Md. 206, 216, 19 Atl. 648). But these decisions have not been followed, and the reason of the case, the later decisions of the courts, and the declarations of the text-books have united to make the proposition we have announced the established law of the land.

It is contended, however, that the appellee is estopped from insisting upon his claim to recover in this case, because before his stock was placed in the name of Felix J. Stark, trustee, the former certificates which represented it were, by assignments in blank by powers of attorney, and by delivery of possession, placed under the absolute control of Felix J. Stark, who might then have sold and assigned them without notice to the corporation of the trust relation. The answer is that he did not sell and transfer them when he appeared

to be the owner and to have the control of them. While they stood in his name as owner, or while the certificates were assigned in blank, and he had the power to insert the name of the assignee, he appeared to be the owner, and was thereby given apparent authority to sell and dispose of the stock. If he had used this appearance of power, the appellee would have been estopped to deny that the power existed, because he caused that power to appear to be granted to his brother. He did not use it, but caused notice to be spread upon the records of this corporation, and to be inserted in the certificates, that he held the title to this stock, not for himself, but as trustee for another. When this had been done, the corporation had received its notice, and it was too late for it to rely upon an appearance that had been removed. Felix J. Stark had raised the red flag. He had notified the corporation that he was not the owner, and had not the power to dispose of the stock without the assent of his *cestui que trust*. For this reason the appellee was not estopped from enforcing his rights and recovering the value of his stock.

Another objection to the decree for the appellee is that Felix J. Stark was a broker in Salt Lake City, and that it was an established custom among the brokers of that city to carry in their names as trustees the stock of third parties, and to assign and transfer it without the consent of their *cestui que trustent*. There is no evidence that this custom was known to the appellee, who was a resident of the city of St. Louis. But there is another and a conclusive reason why it cannot deprive the appellee of his property in this case. It changes the nature—the essence—of the relation of trustee and *cestui que trust*. It gives to the trustee a power which that relation and the obligations which condition it deny, and for that reason it cannot obtain to destroy or change the legal rights of the parties. A local custom which relates simply to the mode of the performance of a contract or to its interpretation, if established and known to the parties,

may be enforced. But one which makes a substantial change in the rights and relations of the parties, and which violates a settled rule of law, binds no one who does not know and assent to it. *Irwin v. Williar*, 110 U. S. 499, 515, 516; *Allen v. Bank*, 120 U. S. 20, 39; *Robinson v. Mollett*, L. R. 7 H. L. 802, 816, 828, 836; *Barnard v. Kellogg*, 10 Wall. 383; *Shaw v. Spencer*, 100 Mass. 382, 393; *Lehman v. Marshall*, 47 Ala. 362; *Leuckhart v. Cooper*, 3 Bing. N. C. 99; *Baxter v. Sherman*, 73 Minn. 434, 441, 76 N. W. 211; Lowell, Stocks, § 69.

Finally it is insisted that there can be no recovery in this case because Felix J. Stark, trustee, had assigned and delivered the certificates of stock to the purchasers, and they were lost to the appellee before the corporation took any action in the matter. In support of this contention our attention is drawn to section 330 of the Revised Statutes of Utah of 1898, which provides that the delivery of a stock certificate, together with a written transfer of the same, signed by the owner, to a bona fide purchaser or pledgee for value, shall be deemed a sufficient transfer of the title, as against any creditor of the transferrer, and all other persons whatsoever. It is conceded that if, before the appellant acted, this stock had been so transferred, by the assignment and delivery of the certificate, that the title and ownership had passed beyond the reach of the appellee, there could have been no recovery against the corporation because it was liable for no loss which its negligence did not cause. The difficulty with the argument for the appellant here is that no such transfer of title had been effected. The certificates themselves bore the declaration that they were the property of Felix J. Stark, trustee. That assertion, as we have seen, was a warning and a statement that he was not the owner of them, and that he had not the power to dispose of them, and every purchaser who took them received them with notice of these facts. If the corporation had refused to accept the

surrender of the certificates, to issue new certificates in their place to the purchasers, and to transfer the stock upon its records, the purchasers could have enforced no transfer, and would have acquired no rights by the possession and the assignments of the certificates. But the action of the corporation in canceling those certificates, in issuing others in their place, in certifying the ownership in third parties, and in transferring the title upon their records, destroyed the appellee's evidence of title, estopped the corporation from denying, as against innocent purchasers, and that the new certificates belong to others than the appellee, and thus divested him of his property. Neither the act of the trustee nor of the purchasers could have deprived the appellee of his equitable ownership in this stock without the concurrent action of the corporation, and it cannot escape liability for that action. The decree below is affirmed.

PARROT SILVER & COPPER CO. v. A. P. HEINZE ET AL.

(25 Montana 139; 64 Pac. 326. Supreme Court. March 11, 1901.)

Discretion as to injunction. On an issue as to where the lode goes to restrain the removal of ore in an apex case the plaintiff having substantial evidence of his contention the discretion of the Court below in allowing the writ will not be controlled.

¹**Where the vein crosses both side lines** the side lines become end lines and the vein has no extralateral rights.

Where the vein crosses one side line and departs at one end line the extralateral rights are bounded by the vertical plane of such end line and a parallel plane extended downward at the point where the apex leaves the side line.

The grant of a lode patent differs from a common law grant in only two respects, to-wit.: It is enlarged by the addition of certain extralateral rights and is subject to the exercise of the extralateral rights of adjacent grants of the like character.

²**The common law right.** Where a vein is found within the vertical planes of a patent and its apex is not found within the lines of some other patent or location having such lines relative to the apex as to give it the right to follow on the dip to reach the vein within the lines of the patent enclosing a part of the vein on its dip, such patent holds the part of the vein so enclosed under parcel of its content as a common law grant.

Appeal from District Court, Silver Bow County; WILLIAM CLANCY, Judge.

Suit by the Parrot Silver & Copper Company against A. P. Heinze and others to determine the title to ore bodies beneath the surface of plaintiff's mining claim, and for injunction *pendente lite* to restrain defendants from removing ores therefrom. From an order granting the injunction, defendants appeal. Affirmed.

McHATTON & COTTER, and J. M. DENNY, for appellants.

¹*Flagstaff Co. v. Tarbet*, 9 M. R. 607. *King v. Amy Co.* 18 M. R. 76.

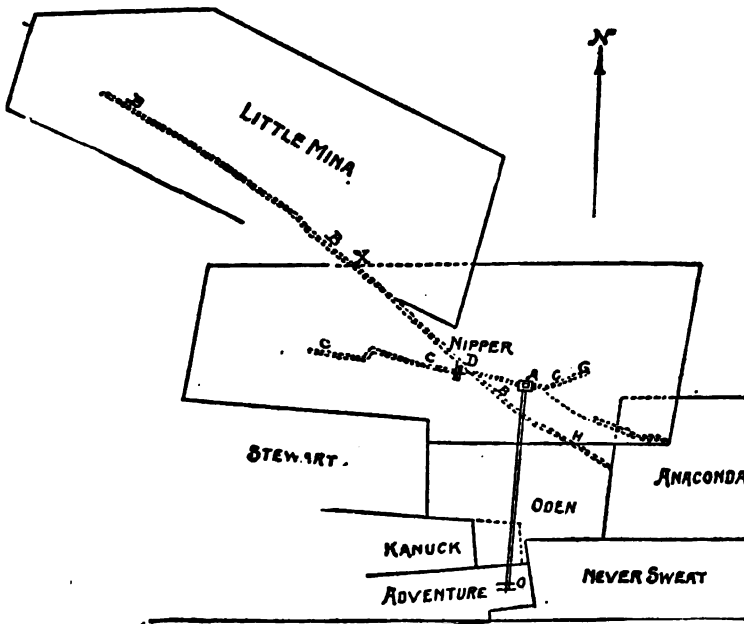
²*State v. District Court*, 25 Mont. 572; 65 Pac. 1020.

But the court will not assume that a patent not pretending to have

WM. SCALLON, J. K. MACDONALD, and T. J. WALSH, for respondent.

BRANTLEY, C. J. Action in the nature of ejectment to determine the title to certain openings and ore bodies beneath the surface of the Adventure mining claim, situate in Silver Bow county. The plaintiff, upon filing the complaint, asked for an injunction *pendente lite* to restrain defendants from removing the ores in question. From an order granting the injunction the defendants have appealed.

The principal question presented by the appeal can best be understood by reference to the subjoined diagram, which illustrates the contentions of the parties:



the apex itself, has such common law right in a case where all parties who might assert ownership by the apex right, are not in court. *Rozanna Co. v. Cone*, 20 M. R. 323.

What formation amounts to an apex is a jury question. *Illinois*

The plaintiff is the owner of the Adventure claim, with all the rights conferred by a patent thereto from the United States. The defendant F. Augustus Heinze is the owner of thirty-one undivided thirty-sixths of the Nipper claim, also patented, lying to the north. When this controversy arose the defendant Arthur P. Heinze, was in possession of the Nipper claim as lessee of the interest of F. Augustus Heinze, and was engaged in mining and extracting ore at the point O, beneath the surface and within the vertical planes passing downward through the boundaries of the Adventure claim. These operations were conducted through a "working winze" descending into the earth from the surface within the boundaries of the Nipper claim at A, and following the vein on its dip to the south at an angle of about 75 degrees through the intervening country to the point O, at a depth of 1,300 feet below the surface. The plaintiff admits that the ore bodies at this point have their apex in the Nipper claim, but contends that the evidence shows that this apex, instead of crossing the end lines of the Nipper claim, follows the course indicated by the line B, B, B, passing across the north side line of the Nipper in the Little Mina at X, towards the northwest, and through the south side line into the Oden

Co. v. Raff, 7 N. Mex. 336; 34 Pac. 544. *Blue Bird Co. v. Largey*, 49 Fed. 289.

In proving continuity down, there must be a continuous streak—not merely indications which a miner might follow. *Fitzgerald v. Clark*, 17 Mont. 100; 42 Pac. 273. See *Butte Co. v. Societe*, 23 Mont. 177; 58 Pac. 111.

Extralateral rights are determined by the actual existence of the vein and not its lode line as marked on the patent. *Cons. Wyoming Co. v. Champion Co.* 18 M. R. 113.

The burden of proof is on the extralateral claimant. Proof of strike of vein where exposed admissible. *Maloney v. King*, — Mont. —; 76 Pac. 4.

The presumption that the owner of the surface is the owner of the ore beneath the surface is not overcome by the opinion of an engineer that a certain vein if it keeps its dip would apex the ore in controversy. *Heinze v. Boston Co.* — Mont. —; 77 Pac. 421.

claim at H, and thence across the east end line of the Oden into the Anaconda, towards the southeast. This being the condition of the vein, it is confidently asserted that the Nipper claim has no extralateral rights, and that, therefore, since none of the intervening claims have any part of the apex, so as to give them extralateral rights, the ore bodies in controversy belong to the plaintiff by virtue of what counsel assert are its common-law rights.

Defendants, on their part, contend that the evidence shows that the apex of the vein, as demonstrated by developments at and beneath the surface within the boundaries of the Nipper claim, follows the general direction of the side lines from near the west end line, through the point of discovery at D, and crosses the south side line into the Anaconda at a point near the southeast corner of the Nipper claim. The position of the vein under this contention is indicated by the letters C, C, C. There is some evidence to show that there is also a branch of this vein passing off in the direction indicated by the letter G.

There is a sharp conflict in the evidence introduced to support these adverse contentions as to the strike of the vein. The district court issued the injunction after a hearing. It is evident from the situation as illustrated by the diagram, that the court found in favor of plaintiff's contention. Otherwise, its action cannot be justified upon any reasonable theory; for, if the theory of the defendants is correct, it is clear that, in following the vein on its dip, they are merely asserting their extralateral rights granted under their patent, though in doing so they pass entirely through the adjoining claims on the south and enter plaintiff's claim.

Upon the evidence submitted the district court might have found in favor of defendants' contention. As it did not, however, and as there is substantial evidence tending directly to support plaintiff's contention, we do not feel justified in holding that the showing made by plaintiff was not reason-

able, or that the court abused its discretion in finding as it did. The rule heretofore applied by this court in this class of cases is that the granting of a preliminary injunction is so largely a matter of discretion that it will be sustained, upon appeal, where there has been a reasonable showing made in support of the application in the court below. *Anaconda M. Co. v. Butte & B. M. Co.*, 17 Mont. 519, 43 Pac. 924; *Montana Ore-Purchasing Co. v. Boston & M. Con. M. Co.*, 20 Mont. 528, 52 Pac. 273; *Butte & B. M. Co. v. Montana Ore-Purchasing Co.*, 21 Mont. 539, 52 Pac. 375; *Montana Ore-Purchasing Co. v. Boston & M. Con. M. Co.*, 22 Mont. 159, 56 Pac. 120. For present purposes, therefore, we shall assume the finding in favor of plaintiff as to the course of the vein through the Nipper claim to be correct, and proceed to determine the legal question presented upon this theory of the case.

From this point of view it is apparent that the apex of the vein, in its course through the Nipper claim, crosses both side lines. The defendants, therefore, have no right to follow the vein on its dip in the direction of the Adventure claim. The supposed side lines of the Nipper claim are in fact end lines, and whatever rights its owners have to follow the vein in the direction of the Adventure are limited by a vertical plane passing downward through the south side line extended in its own direction towards the west. "It may be considered as absolutely and finally settled that, where a vein on its course crosses two opposite side lines, the vein cannot be followed, either on its dip or strike, beyond vertical planes drawn through the side-end lines, and that the angle at which it crosses these side lines makes no difference in the application of the principle." 2 Lindl. Mines, § 588. This is a concise statement of the present condition of the law upon this subject as declared by the supreme court of the United States in *Flagstaff Silver M. Co. v. Tarbet*, 98 U. S. 463; in *Iron Silver M. Co. v. Elgin M. & S. Co.*, 118 U. S. 196; in *Argen-*

tine M. Co. v. Terrible M. Co., 122 U. S. 478; in *King v. Mining Co.*, 152 U. S. 222, and in *Last Chance M. Co. v. Tyler M. Co.*, 157 U. S. 683, and the question as to what are the extralateral rights of the owner of a claim in which the apex is situated as in the Nipper is not now open to further discussion.

It is equally as well settled by the adjudicated cases that the extralateral rights of the owners of the Oden claim, lying to the south between the Nipper and the Adventure, if they have any at all upon the vein in question, are limited towards the west by a vertical plane passing downward through the point H, and parallel with the east end line of that claim. Assuming that the end lines of the Oden are parallel, a condition is presented which was considered by this court in *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, and the conclusion there stated is that, where the apex of the vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line. This case was affirmed on appeal by the supreme court of the United States (171 U. S. 92), upon the authority of *Del Monte Co. v. Last Chance Co.*, 171 U. S. 55, decided on the same day. If the end lines are not parallel the owners of the claim have no extra lateral rights.

It thus appears that neither the owners of the Nipper nor of the Oden have, by virtue of their title to the portion of the apex within their respective boundaries, the right to follow the vein on its dip into the ground underlying the Adventure; in other words, these claims have no extralateral rights in the direction of the Adventure.

The question presented for determination upon this condition of affairs may therefore be stated thus: Assuming that the apex of the vein from which the appellants are extracting ore beneath the Adventure surface is in the Nipper

ground, and that the vein in its strike crosses both of the side lines of the Nipper, so that the owners of the Nipper may not follow the vein on its dip to the south; can the respondent, who owns the Adventure claim, successfully assert title to the ores in that part of the vein beneath its surface and within the planes of its exterior boundaries? The appellants insist that it cannot do so, because, not having the top or apex of the vein within the exterior boundaries of the Adventure claim, it has no title to the part of the vein lying under the surface, notwithstanding appellants have no title thereto. In other words, this part of the vein was not granted to the respondent by its patent, and therefore the appellants, though without title themselves, commit no wrong upon respondent in entering beneath the surface and taking away ores to which it has no title. This contention has no foundation either in law or reason. Under the common law rule as adopted in this country, a grant of lands without specific reservation conveys all rights above and beneath the surface, —“*usque ad cælum et ad orcum*.” It is not uncommon, however, for such conveyances to make reservations of rights both above and below the surface, and the fact that this is true in a particular case in no way affects the validity of the particular conveyance.

In what respect does a grant from the United States under the laws regulating the disposition of mineral lands differ from a common-law grant? To reach a solution of this question, regard must be had to the statute itself. Section 2322 of the Revised Statutes of the United States provides: “The locators of all mining locations heretofore made, or which shall hereafter be made, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far

depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." If this section stood alone, it would seem to restrict the rights of the locator to the use and enjoyment of the surface only for the purpose of following the vein upon its strike and dip under the prescribed limitations as to adjoining lands. Reading this in connection with the other provisions of the chapter, however, we find that it is "lands valuable for minerals" which are reserved from sale except as otherwise directed, it is "lands" in which the deposits are found which are open to occupation and purchase, it is "land claimed and located for valuable deposits" for which the patent may be obtained, and it is by virtue of the title secured to land that the purchaser obtains any right whatever with reference to mineral deposits therein. Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant. On the other hand, this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only

do the rights conferred by the statute differ from those held under a common-law grant. "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at the common law." *Doe v. Mining Co.* 54 Fed. 935; *Leadville Co. v. Fitzgerald*, 4 Mor. Min. Rep. 385, Fed. Cas. No. 8, 158.

The passage quoted from the opinion of Judge Ross in *Doe v. Mining Co.*, *supra*, is directly in accord with the views expressed by the supreme court of Dakota in *Duggan v. Davey*, 26 N. W. 887, as well as with the result of *King v. Mining Co.*, *supra*. In the latter case the defendant was the owner of the Amy claim. The plaintiff and the defendant were tenants in common in the Nonconsolidated claim, having a common boundary with the Amy on the north. The apex of the vein in the Amy crossed both side lines and passed into the Nonconsolidated across the common boundary. The defendant had taken a large amount of ore from within that portion of the Nonconsolidated east of a plane passing downward through a line parallel with the end lines of the Amy at a point where the vein passed into the Nonconsolidated. This court (9 Mont. 543, 24 Pac. 200) held that this ore belonged to the defendant by virtue of its right to follow the vein on its dip toward the north. Upon appeal the supreme court of the United States reversed the judgment of this court, holding that the side lines of the Amy were its end lines, that the extralateral rights of the defendant towards the north were limited by the vertical plane of the north side line, and that the plaintiff, in addition to a decree of partition demanded as the principal relief, was entitled to an accounting for the ores in controversy. By reference to the diagram in the opinion in 9 Mont. 569, 24 Pac. 201, it will be seen that the apex of the part of the vein to which the ore in controversy belonged was not in the Nonconsolidated,

but in the Amy, claim; and upon no other theory can the judgment of the supreme court of the United States be justified than that the owners of the Nonconsolidated were entitled to the ore by virtue of their common-law right under their patent. The same may be said of the result of the judgment in *Iron Silver M. Co. v. Elgin M. & S. Co.*, *supra*, where similar conditions existed as to the apex of the ore in controversy.

Under the provisions of the statute, as they have been construed by these and the other cases heretofore cited, it is only the locator, or his successor, or a patentee, who has any right to follow a vein into the boundaries of an adjoining owner; and the latter, holding under a location or patent, is *prima facie* entitled to everything beneath his surface. He may assert this *prima facie* title to prevent intrusion by any one who cannot show that he comes with the right acquired by a compliance with the provisions of the statute. This conclusion is also in accord with the spirit of all the statutes regulating the disposition of the public lands, which make it manifest that it is the policy of the government to grant every right therein, except where express reservation is made.

Defendants cite and rely upon *Montana Co. v. Clark*, 42 Fed. 626, and *Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726, as conclusive of their contention. It is true that in *Montana Co. v. Clark*, Judge Knowles reached a conclusion directly contrary to that here stated; but that case is contrary to all the authorities so far as we are advised, and does not meet with our approval. The case of *Driscoll v. Dunwoody* is not pertinent, as it does not deal with any phase of the question involved in the case at bar.

The hearing in the court below was upon oral evidence and affidavits. Objection was made by appellants to the introduction of two of the affidavits offered by plaintiff, on the ground that they were immaterial and incompetent. The ob-

jection was overruled. Appellants allege error. We have examined the affidavits in question, and conclude that the court committed no prejudicial error in admitting and considering them. One of them was immaterial; but it is apparent that, if it had been excluded, the result would not have been different.

The order of the district court is affirmed.

Affirmed.

FRANK UREN V. GOLDEN TUNNEL MINING CO.

(24 Washington 261; 64 Pac. 174. Supreme Court. March 13, 1901.)

Evidence under general allegation of negligence. Where the complaint in an action to recover for personal injuries contains a general allegation of negligence, any fact tending to contribute approximately to the injury is admissible in evidence thereunder.

Disputed facts not reviewed. Where there was evidence to warrant a finding that an employe was injured by a particular rock thrown down a hill by a mining company, such finding will not be disturbed on appeal.

Two superintendents in separate tunnels. The fact that two men were working for the same mining company would not make them fellow servants, when they were employed in separate tunnels under different superintendents, where no supervision of each other's work was possible and no opportunity afforded to use precautions against each other's negligence.

Limitation on usual risks. The rule that an employee cannot recover for an injury received from a danger which is naturally and necessarily incident to work he is hired to do, and which is apparent to a reasonably prudent man, is not applicable to a case where a miner working on a tunnel of defendant in a narrow gulch, some eight hundred feet below another tunnel operated by defendant, is injured by a rock thrown from the upper tunnel, when it had not been customary to roll them down that particular gulch, and they could have been disposed of by throwing them down another gulch, where no work was going on.

Error not urged below. Where evidence as to the incompetency of a mine superintendent was admitted without objection, and the defendant tried its cause on that issue, it cannot urge on appeal that the court erred in submitting the question to the jury.

Damages not excessive. Where a young man's foot was badly injured, and crushed so that some of the bones had to be extracted, the injuries confining him to a hospital for a month, and compelling him to go maimed through life, a verdict of \$8,500 was not excessive.

Fellow Servants. A mining boss is a fellow servant. *Reese v. Biddle*, 112 Pa. 72; 3 Atl. 813. *Waddell v. Simoson*, 112 Pa. 567; 4 Atl. 725.

A foreman with 10 or 12 men under him but who himself is under a pit boss and superintendent, is a fellow servant. *Whatcheer Co. v. Jackson*, 56 Fed. 810.

Appeal from Superior Court, King County; E. D. BENSON, Judge.

Action by Frank Uren against the Golden Tunnel Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

MILO A. ROOT, for appellant.

BAUSMAN, KELLEHER & EMORY, for respondent.

DUNBAR, J. The respondent sued the appellant for damages alleged to have been sustained from injury caused by a stone rolling down the mountain side and striking his foot. The appellant, which is a mining company, was operating two tunnels on the side of a mountain,—one eight or nine hundred feet below the other. The work at the upper tunnel was operated by one gang of men, and the second or lower tunnel was operated by a separate gang of men. These working camps were situated in a narrow gorge in the side of the mountain. The testimony shows that Mr. Hager was the president of the company, and in control of all the company's affairs and operations. There were two mining super-

Courts will not decide on demurrer non-liability on account of the accident being chargeable to fellow servant. *Evans v. Carbon Hill Co.* 47 Fed. 437.

Where the injury results from obeying superintendent's orders company is not relieved, although at the moment plaintiff was under the immediate supervision of a fellow-servant. *Northern Pac. Co. v. Richmond*, 58 Fed. 756.

The rule as to fellow servants in different departments. *Coal Creek Co. v. Davis*, 90 Tenn. 711; 18 S. W. 387. *Dixon v. Chicago R. Co.* 109 Mo. 413; 19 S. W. 412.

A shift boss is fellow servant with a trammer. *Petaja v. Aurora Co.* 106 Mich. 463; 66 N. W. 951.

A convict is not a fellow servant. *Buckalew v. Tennessee Co.* 112 Ala. 146; 20 So. 606.

intendents,—Mr. Ellis, who superintended the upper tunnel, and Mr. Williams, who superintended the lower tunnel. Each of these two men had charge of his respective tunnel and his respective gang of men, had authority to control and direct their operations, and had absolute control, subject only to the orders of the president. Mr. Uren was working at the lower tunnel. The cañon was shaped like a chute, being from 12 to 18 feet wide, with high walls on each side. On the morning of the accident, Uren was drilling. He had been at work about half an hour in the mouth of the lower tunnel. A short distance up the hill above the mouth of the tunnel there was a blacksmith shop, where there were a forge, bellows, and anvil, which were kept there for the purpose of sharpening tools. Uren had left the mouth of the lower tunnel, and started up this cañon to the blacksmith shop, for the purpose of sharpening his tools, and had just arrived at the shop, when he saw a rock coming down through the cañon with great velocity. In attempting to avoid the rock by moving forward, he was struck by the same on the foot, and his foot was mashed to such an extent that he had to have a portion of the bones of the foot removed, and, according to

Foreman (where different departments and different gangs) held still a fellow servant. *Alaska Co. v. Whelan*, 168 U. S. 86.

Shift boss is a vice principal. *McMahon v. Ida Co.* 95 Wis. 308; 70 N. W. 478.

As to whether two shifts are fellow workmen, see *Shannon v. Cons. Tiger Co.* 24 Wash. 119; 64 Pac. 170.

Shift boss is fellow servant. Duty of employee to report incompetency of fellow servant. *Weeks v. Scharer*, 111 Fed. 330.

Owner chargeable with whatever mine boss knows. Where mine boss directs ordinary miner to perform boss's duties, such miner becomes boss. *Wellston Co. v. Smith*, 65 Oh. St. 70; 61 N. E. 143.

The man who lowers cage is not a fellow servant with a miner; neither is a tool carrier. *Jenkins v. Mammoth Co.* 24 Utah, 513; 68 Pac. 845.

Discussion as to who are fellow servants in a coal mine. *Cerrillos Co. v. Deserant*, 9 New Mex. 49. Reversed on other points, 20 M. R. 573.

the testimony, was permanently maimed. Upon the trial of the cause, judgment was rendered in his favor for \$8,500.

The appellant alleges several errors, and we notice them in the order of its argument: The first contention is that the complaint was not sufficient, under the statutes,—that the facts were not sufficiently set forth to sustain the testimony introduced. There was no demurrer to the complaint, and it will, therefore, be construed liberally in favor of its sufficiency. However, we think the complaint was sufficient, under any circumstances. After alleging employment, etc., paragraph 3 of the complaint is as follows:

"That on or about the 4th day of October, 1899, and while said plaintiff was in the performance of his duties as an employé of said corporation at a point situated below one of the tunnels upon said defendant's said mining claim, the above-named defendant, under and by virtue of the orders and direction of its president and general superintendent and foreman, so negligently, carelessly, wrongfully, and willfully cleaned out and removed from the mouth of said upper tunnel certain large masses of rock, that said masses of rock were precipitated from the mouth of said tunnel and down the mountain side, upon which said claim is situated, in such a manner that one of said masses of rock struck against said plaintiff with great violence."

An operator of a steam drill is a fellow servant of his helper. Master held not liable for drilling into unexploded cartridge. *Liven-good v. Joplin-Galena Co.* 179 Mo. 229; 77 S. W. 1077.

A minor son assisting his father in a coal mine with the master's express or implied consent, is a servant of the master within the rule respecting safety of employees. *Ringue v. Oregon Co.* 44 Oreg. 407; 75 Pac. 703.

In Wyoming all persons employed in the same general work are not necessarily fellow servants. Those in charge of others are vice principals. *Johnson v. U. P. Coal Co.* — Utah —; 76 Pac. 1089.

A shift boss is not a fellow servant. Recital of instances of what relations have been decided to be fellow servants. The power to temporarily discharge a workman does not make the boss having such power a vice principal. *Weeks v. Scharer*, 129 Fed. 333.

The fact that the vice principal works with his men does not affect the master's liability. *Carter v. Baldwin*, 107 Mo. App. 217; 81 S. W. 204.

Paragraph 4 alleges the injury for which the damages are claimed.

It is contended by the respondent that, under a general allegation, any fact tending to contribute to the injury was admissible, and many cases are cited to sustain this contention. It is not, however, necessary to review the cases cited; for this court, in *Cogswell v. Railway Co.*, 5 Wash. 46, 31 Pac. 411, established the doctrine that, under a general allegation of negligence, any fact tending to contribute approximately to the injury was admissible. In that case it was held that under an allegation in the complaint for damages that the defendant so negligently and unskillfully conducted itself in the management of its car that, through the negligence of defendant and its servants in guiding the car, plaintiff was injured, it was admissible to prove defects in the brake rod of the car. In a late case decided by this court (*viz. Collett v. Railway Co.*, 63 Pac. 225) it was held that, when defendant was notified by the complaint with what negligence he was charged, he was thereby informed that the circumstances which tended to show whether he was wanting in due care would be in issue. The question was discussed at length in that case, and the authorities cited, and it would be of no avail to repeat the argument or review the authorities again. We think the complaint is sufficient.

Where a possible source of danger is pointed out to a vice principal, an employee has the right to rely on his more experienced judgment that the place is safe. *Id.*

The master is liable for neglect to repair the mine roof though the original defect was the fault of a fellow servant. *Chicago Co. v. Moran*, 210 Ill. 9; 71 N. E. 38.

Miner is not a fellow servant with the engineer. *Spring Valley Co. v. Patting*, 210 Ill. 342; 71 N. E. 371.

What constitutes a fellow servant is a question of law where the facts are conceded and the relations of the parties clear. *Id.*

The question whether under the facts plaintiff and the party causing the injury were fellow servants is a jury question. *Spring Valley Co. v. Robizas*, 207 Ill. 226; 69 N. E. 925.

The next contention is that the evidence does not prove that the respondent was struck by the rock that was thrown down the cañon by the plaintiff. This is a question which was submitted to the discretion of the jury, and, there being sufficient testimony to warrant it in coming to the conclusion that the respondent was struck by the particular rock described, its verdict will not be disturbed in that particular.

The next contention is that the respondent was injured by the action of fellow servants. This contention is also untenable. The work of removing the rocks was done under the supervision of one Beach, who had control of the work at that time, and had been instructed by Ellis, the tunnel superintendent, to throw the rock down the cañon. Beach was evidently acting as a vice principal, and the men working with him were working under his supervision and control, although there seems to be sufficient testimony here to warrant the jury in concluding that not only Beach, but Hager, the president, and Ellis, the superintendent of the upper tunnel, as well as Williams, the superintendent of the lower tunnel, were all guilty of negligence; for the testimony shows—and we are speaking of the testimony of the plaintiff—that

The foreman represents the master and for the results of his negligence the master is liable. *Borgerson v. Cook Co.* 91 Minn. 91; 97 N. W. 734. *Donnelly v. Aida M. Co.* 103 Mo. App. 349; 77 S. W. 130.

Where it is the duty of some one of the same gang to give warning of a blast and he fails to give such warning, it is the negligence of a fellow servant and no recovery is allowable. *Kelly Island Co. v. Pachuta*, 69 Ohio 462; 69 N. E. 988. *Contra, Hjelm v. Western Gr. Co.* — Minn. —; 102 N. W. 384.

That a pit boss worked along with a miner did not make them fellow servants. On disputed facts the question of fellow servant is for the jury. *Cons. Coal Co. v. Fleischbein*, 207 Ill. 593; 69 N. E. 963.

Employees working together though under different foreman held to be fellow servants. *Jackson v. Lincoln Co.* 106 Mo. App. 441; 80 S. W. 727.

A "boss driver" is a vice principal. *Collingwood v. Illinois Co.* — Iowa —; 101 N. W. 283.

this work was planned and the manner of its execution directed by the president, and that Williams, the superintendent of the lower tunnel, was notified on the morning of the accident that the rock would be thrown down the gorge, but that he neglected to notify the respondent of that fact when he went to work. The doctrine of fellow servants has been discussed at such length and so often by this court that it seems profitless to again enter into a discussion of the subject and an analysis of the authorities. In *Zintek v. Mill Co.*, 9 Wash. 395, 37 Pac. 340, it was held that the yard boss of a lumber yard, whose duty it was to superintend the piling of lumber therein, and direct the workmen engaged in said work, who were subject to his order and control, stood in the position of vice principal, instead of fellow servant, of such workmen, although he occasionally performed other work, and although his authority to hire and discharge men was subject to the approval of the general superintendent. The subject was reviewed again at length in *Hammarberg v. Lumber Co.*, 19 Wash. 537, 53 Pac. 727, where it was said that the rule was well established that, in order to constitute one a fellow servant, he must be in the same common employment of the one who has suffered from his negligence; citing approvingly *Cooper v. Mullins*, 30 Ga. 146, where it was held that none were deemed to be in a common employment who had no opportunity to use precautions against each other's negligence. Again, in a case recently decided by this court and not yet reported, viz. *Shannon v. Mining Co.*, 64 Pac. 169,—a case very much like the case at bar,—where three shifts of men were working, and a man in one shift was injured through the negligence of the men in another shift in leaving an unexploded blast, and the boss or man in control failed to notify the men comprising the incoming shift of the danger which threatened them, it was held that the doctrine of fellow servants did not obtain in that case. In fact, we cannot understand how, under any theory of law, the

man in charge of the work at the upper tunnel could be held to be a fellow servant with an employé working under another superintendent in another locality, and where no supervision of each other's work was possible. There can be no question but that it was negligence on the part of the appellant to throw these rocks down the narrow gorge, where men were working below, under the circumstances as shown by the testimony in this case.

It is asserted, in the fourth place, that it is well settled by the decisions of this as well as other courts, that an employé cannot recover for an injury from a danger which is naturally and necessarily incident to the work he is hired to do, and which is apparent to a reasonably prudent man. This proposition of law cannot be gainsaid, but it seems to have no application to the case at bar. The testimony does not show, as is asserted by the appellant in its brief, that it was usual for rocks to be rolled down this hill. On the contrary, not only the respondent, but other witnesses, testified that such was not the custom, and that they had never known of rocks before that time having been rolled down by the workmen from above. It was evidently considered by the operators at the tunnel above a dangerous thing to do; for they notified Williams, the superintendent of the lower tunnel, that they were about to commence throwing rocks down the gulch. But there was no testimony that this knowledge was conveyed to the respondent. In fact, the testimony is conclusive that it was not. Hence the danger which culminated in the injury received by respondent was not apparent to him, and was not naturally incident to his employment; for the testimony shows that, if the work had been done in a workmanlike and cautious manner, the rocks could have been thrown down another gulch, where no work was going on, and that it was not necessary for the promotion of the work to throw them down the gulch where the respondent was working.

The next contention is that the court erred in submitting the question of the incompetency of Superintendent Ellis to the jury. But, in addition to the fact that, under the theory of law which we have discussed above, the testimony was competent under the general averments of negligence incorporated in the complaint, the testimony was introduced without objection, and the appellant introduced proof tending to show the competency of Ellis as a mining superintendent. Having elected to try its cause on this issue, the appellant cannot ask to have the judgment reversed because it failed in maintaining that issue before the jury. 12 Enc. Pl. & Prac. p. 165.

The instructions asked for by the appellant which had not already in substance been given by the court have been disposed of by what has been said on the different points raised above. It appears plainly from the record that there was sufficient testimony to warrant the jury in finding the defendant guilty of negligence in its manner of operating the mine, to find that the respondent was not guilty of contributory negligence, and that his injury was caused by the negligent manner of operating the mine as alleged in the complaint.

It is finally contended that the verdict was so excessive that it indicates passion and prejudice on the part of the jury. But, from the injury which was evidently sustained by the plaintiff, who was a young man, and who by reason of the injury will be compelled to go through life maimed, in addition to the suffering which he endured and the expense incurred, we cannot say that it appears that the verdict was rendered through passion or prejudice.

The cause having been tried to the jury under proper instructions, and there having been evidence sufficient to maintain the verdict, the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

SUN DANCE GOLD MINING CO. ET AL. v. A. C. FROST.

(64 Pacific 435. Supreme Court of Arizona. March 21, 1901.)

Attempt to exclude associate. Corporate knowledge. Where two associates began negotiations for the purchase of a mine upon which a company was to be organized and certain stock issued to them and one of them by false representations procured the contract in his own name and the company with full knowledge of the facts issued all the stock to him they became liable to the defrauded party for the value of half the stock at the time of its issue.

Acquiring antagonistic interests. Where a fiduciary relation is established between two, neither can acquire a sole interest antagonistic to the other.

No proof of actual fraud is necessary where such fiduciary relation exists.

Appeal from District Court, Yavapai County; before Chief Justice Webster Street.

A co-buyer who paid less for the claim than the price he represented to his associates, must account for the difference. *Merino v. Munzo*, 38 N. Y. Sup. 678.

False representation made by the officer of a corporation, he being ignorant of their falsity, are not false representations chargeable to his company. *Watson Coal Co. v. James*, 72 Iowa 184; 33 N. W. 622.

A party is bound where he assumes to have knowledge. Assertions of value are not misrepresentations; there must be an intent to deceive. *Lehigh Zinc Co. v. Bamford*, 150 U. S. 665.

Buyer concealing output of oil well adjoining the land he bought, held no fraud. *Neill v. Shamburg*, 158 Pa. 263; 27 Atl. 992.

May be predicated on an opinion of an expert or engineer on a point which one in his profession ought to know. *Louisville R. Co. v. Brodenschatz Co.* 141 Ind. 251; 39 N. E. 703.

False representation that mine was full of water, thus preventing examination. *Kelley v. Boettcher*, 85 Fed. 55.

Sale will be set aside when vendor's supposed agent was really acting as purchaser. *Donovan v. Campion*, 85 Fed. 71.

As to promises not intended to be fulfilled see *Lawrence v. Gayetty*, 17 M. R. 169, and notes.

Review of evidence tending to prove salting ore on facts held to be suspicious but not sufficient proof of fraud. *Henry v. Mayer*,

Suit by A. C. Frost against the Sun Dance Gold Mining Company and others to recover the value of certain corporate stock which should have been issued to plaintiff. From a decree in favor of plaintiff, defendants appeal. Affirmed.

E. M. SANFORD, for appellants.

KRETZINGER, GALLAGHER & ROONEY, for appellee.

DOAN, J. This was an action brought in the district court of Yavapai county by A. C. Frost, of Chicago, against L. A. Davies, of Chicago, and the Sun Dance Gold Mining Company, an Arizona corporation, then operating the Silver Traill and W. E. Thorne gold mines in Yavapai county, Ariz. The complaint sought to compel the defendants to pay to the plaintiff the reasonable and market value of 200,000 shares of the capital stock of the Sun Dance Gold Mining Company, and to have the amount found due to the plaintiff to be adjudged a first and prior lien upon the Silver Traill and W. E. Thorne mines. The complaint was demurred to by the defendants, and the demurrer was overruled. After

(Ariz.) 53 Pac. 590. Proof of salting by hypothesis. *Mudsill Co. v. Watrous*, 18 M. R. 1.

Vendors' agent represented that he was to receive only a certain commission when in fact he was to receive five times as much. The excess ordered to be deducted from purchase price. *Henry v. Mayer, supra*.

Where an agent collusively surrendered the purchased mine back to the vendor on an accounting immediate redelivery of possession was ordered. *Id.*

Where a party alleges deceit as to representations of value of stock bought by her, it is a defense that she had full warning of the non-value of the stock. *Warner v. Benjamin*, 89 Wis. 290; 62 N. W. 179.

Binford v. Bruso, 22 Ind. App. 512; 54 N. E. 146, holds that it is not fraud to misread a lease to an unlettered lessee, there being no trust relation between the parties. *Contra, Christmas v. Frei*, 78 Mich. 386; 44 N. W. 329.

hearing and argument, a decree was rendered that the plaintiff recover from Davies and the Sun Dance Gold Mining Company \$11,435.94, being the value of 200,000 shares of stock in that company. From this judgment, and the denial of a motion for a new trial, the defendants appeal, and assign as errors: First, that the court erred in overruling the demurrer of defendants to the amended complaint; second, that the findings of the court are not supported by the allegations of the complaint and the law; and, third, that the court erred in its conclusions of law,—giving under each assignment definite specifications wherein the alleged errors were committed.

The transcript of the evidence has not been furnished to this court, but the facts of the case, as expressed in the findings of the lower court, and as recognized and practically admitted in the pleadings, are substantially these: Early in December of 1895, the plaintiff, A. C. Frost, while in Yavapai county, Ariz., met one A. J. Pickrell, the owner of the Silver Traill and W. E. Thorne mining claims, and obtained two reports thereon, and returned with them to Chicago. After his arrival in Chicago, the attention of Davies was called to the property, and on January 23, 1896, Frost and Pickrell entered into an agreement in writing by the terms of which a deed to the property was placed in escrow in the Prescott National Bank, to be delivered on the payment of the purchase price of \$20,000 in the amounts and on the dates therein specified, with the usual forfeiture clause. After this, on February 12th, Frost and Davies entered into an agreement whereby they should jointly meet the payments; Davies should secure purchasers for the property, and he and Frost divide equally the profits realized on the sale thereof. This was a verbal agreement, with a memorandum of the terms expressed in a letter from Frost to Davies, produced in evidence on the trial. The first payment under this escrow agreement fell due on the 15th of February. At that

time Frost and Davies sent a joint letter to one Dr. Vickers, in Prescott, wherein they each inclosed \$500, and dictated a different escrow agreement, changing the dates and the amounts of the remaining partial payments, and asked that this be substituted for the original agreement, and authorized Vickers to sign their names to the second agreement. This was done, the second agreement was duly signed by Pickrell, and the \$1,000 accepted, and Frost's name was signed by Vickers, who explained that through an oversight Davies' name was not signed, but that the deal was made in his, as well as in Frost's, interest; and it was understood by Frost and Davies that Frost held the property for himself and Davies in accordance with their agreement for its joint purchase and disposal. In pursuance of this agreement, Frost and Davies caused the incorporation of the Sun Dance Gold Mining Company, with a capital stock of \$1,000,000, divided into 1,000,000 shares of \$1 each. Frost and Davies and three other persons were elected as a board of directors. Davies was elected president of the company, and Frost secretary.

At a meeting of this board of directors on March 6, 1896, it was agreed between Frost, acting for himself and Davies, and the Sun Dance Gold Mining Company, acting by its board of directors, that Frost should convey to the said company the said Silver Traill and W. E. Thorne mines in consideration of all of the capital stock of the company; that, in consideration of the company's repaying to Frost all the expenses he had incurred relative to the property, he was to transfer to the company 200,000 shares of stock, the proceeds of which should be used in the operation of the property, that 400,000 shares should be sold at 5 cents per share, and the proceeds applied to the payment of the amount remaining due to Pickrell, for the purpose of securing the title; and that the other 400,000 shares should be issued to Frost and Davies as their property severally. The company and

all its officers and directors had full knowledge of all the terms of this agreement, including the exact price Frost and Davies had agreed to pay Pickrell for the mining property, and the amount they were to receive as their respective profits on the consummation of the deal. After the completion of this arrangement, Davies left Chicago on March 9, 1896, for Arizona, for the ostensible purpose of examining the property, in order that he might personally vouch for its merits to persons whom he might interest in the stock. Davies, before leaving Chicago, represented to Frost that, in case the second payment of \$2,000, due March 15th, should become due during his absence, he would either give to the owner his check for the amount, or telegraph Frost in ample time for him to make the remittance. The expense of Davies' trip to Arizona was estimated by him and Frost at \$125, and Frost advanced one-half of this sum to Davies upon his departure from Chicago, and likewise gave him a letter of introduction to the owner of the property, stating that he was the president of the company recently organized for the purpose of buying and operating the property; that the object of his visit was to inform himself, for the benefit of the company, as to the existing conditions at the mine, and to determine what improvements might be necessary to accomplish the best results; and asked Pickrell to give him any information and extend any favors and courtesies that he might be able. Davies, upon his arrival in Prescott, represented to Vickers and Pickrell that Frost had no ability or intention to carry out the escrow agreement; that he (Davies) had contributed the payment already made; and on March 12th—three days before the date for the next payment under the Frost option—induced Pickrell to make another agreement with him personally, which provided that, if the payment under the Frost agreement be not made as required by its terms, Pickrell should execute to Davies a deed duplicate in description of the property, and upon the pay-

ment by Davies of any balance remaining unpaid under the Frost agreement, after crediting to Davies all payments previously made on the purchase price, would deliver said deed to Davies, provided Davies should deliver to him, in excess of the purchase price, 5,000 shares of the said company's stock. After securing this agreement, Davies at once returned to Chicago, and for some 10 days concealed from Frost the execution of the last agreement. Upon representing to Frost that he had secured from Pickrell a short extension, and could sell the stock in ample time to meet the second payment, he obtained from Frost the stock certificates and book, seal, and other papers of the company, and by the use of the stock certificates thus obtained he procured \$2,000 by the sale of stock on March 21, 1896, and remitted the same to Pickrell, whereupon the formal deed transferring the mining properties to Davies alone was placed in escrow under and in pursuance of the agreement secured by Davies from Pickrell on March 12th. Davies then told Frost that he could not raise any money on the stock, and that their option was lost. Davies was still in possession of the seal, stock certificates, and books of the corporation, and soon afterwards Frost was displaced as an officer and director of that company, and the conveyance of the property was made by Davies to the company, in consideration of which 200,000 shares of stock were put into the treasury for development and operation of the property, 400,000 shares were sold to complete the purchase and pay Pickrell, and 400,000 shares were issued to Davies as his personal stock, and were received and retained by him.

The company issued these 400,000 shares of stock to Davies for his personal use with the full knowledge of the facts heretofore stated. The company failed to transfer any stock to Frost. Davies failed and refused to transfer any stock to Frost, or to pay any of the expenses incurred by Frost in the examination and procurement of the property, or to return the one-half of the first payment theretofore

made by Frost. At the time of the issuance of the 400,000 shares to Davies, and for some time thereafter, and at the beginning of this suit, the stock was of the value of $4\frac{7}{8}$ cents per share. Neither Davies nor the company paid anything to Frost for his interest in the property or his services or expenses in securing or in organizing the company.

The court held, as conclusions of law, that Davies was, before and on March 12th, interested with Frost in the promotion and sale of the property in question in such a manner as to preclude him from securing any interest therein antagonistic to Frost; that Davies held the agreement in his own name secured from Pickrell on March 12, 1896, and all rights thereunder, for the benefit of himself and Frost, and that, the Sun Dance Gold Mining Company, having full knowledge of that fact, and of the relation existing between Frost and Davies, the conveyance from Davies to the company inured to the benefit of both him and Frost, and the company was charged with knowledge thereof; that as a part of the consideration of such conveyance, and for his interest in such property, Frost became entitled to receive and have issued to him 200,000 shares of the stock; that the company, having with that knowledge, issued the stock to Davies, and, Davies having received and held it, Frost was entitled to recover from Davies and the company the market value of the stock at the time of its issuance and at the beginning of this suit, with interest thereon.

While the evidence is not presented in the case, there does not seem to be any issue taken upon the facts, but the issues have all arisen from the different legal conclusions arrived at and the different deductions drawn from the facts as agreed upon. The examination of the complaint satisfies us that the facts therein alleged would be sufficient, if fully sustained by the evidence, to constitute a valid cause of action against the defendants, and that the demurrer to the complaint upon the grounds on which it was urged was properly

overruled by the court. The remaining two assignments of error, to-wit, that the findings of the court are not supported by the allegations of the complaint and the law, and that the court erred in its conclusions of law, are based upon the ground that the allegations of the complaint, and the facts as found by the court within the allegations of the complaint, are not sufficient to sustain an action for fraud against the defendants. The facts in the case, as alleged in the complaint, found by the court, and accepted by counsel on both sides in their pleadings, establish beyond question that on March 12, 1896, Frost and Davies, by mutual understanding and agreement, were jointly interested in the purchase and disposal of the Silver Traill and W. E. Thorne mines; that their relations were such as to impose mutual obligations on each to deal with the other in the utmost good faith and candor. In this enterprise they stood in such relation, and were bound up in such a community of interests, as forbade either dealing with the subject-matter of that interest to the detriment or exclusion of the other. As to the purchase and sale of these mines they stood in the relation of partners, and each, as such, was agent and trustee for the other. This community of interests and this partnership relation existing between Davies and Frost in this transaction on March 12, 1896, rendered it legally impossible for Davies to surreptitiously secure a new option in his own name and for his sole benefit, to the exclusion or detriment of Frost; and his attempt to do so did not, in equity, work a change of the legal situation in the escrow agreement, or of the rights of the parties under it, and left wholly unaffected the one-half interest of each in the property; Davies becoming, as the legal result of his action, a trustee of Frost to the extent of the latter's one-half interest in the property. This being the case, it is not necessary that actual fraud should be either alleged or found. The object of the rule which precludes trustees from dealing for their own benefit in matters to which their trust relates

is to prevent secret frauds by removing all inducements to attempt them. The rule is not confined to trustees or others who hold the legal title to the property to be sold, but applies universally to all who come within its principle, which is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account. *Fulton v. Whitney*, 66 N. Y. 548; *Van Epps v. Van Epps*, 9 Paige, 241. This rule is aptly expressed in the American note to *Keech v. Sandford*, 1 White & T. Lead. Cas. Eq. 53, as follows: "Whenever one person is placed in such a relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." Bispham says: "This rule not only applies to persons standing in fiduciary relation towards each other,—such as trustees, executors, attorneys, and agents,—but also to those who occupy any position out of which a similar duty ought, in equity and good morals, to arise." Bisp. Eq. § 93. When Davies went to Prescott, March 7, 1896, he went in the interest of himself and Frost. He was the trusted representative of Frost. Frost paid one-half of his expenses, and furnished him with a letter of introduction to the owner of the property he went to examine. Frost and he had each paid one-half of the first payment on that property. He was there under agreement with Frost that he would either pay the \$2,000 to become due at an early date, or advise Frost in Chicago in ample time to make that payment. Then, without either returning the money, or repudiating the promise to Frost, or resigning the trust, or making any disclosure to Frost as to his intention, he secretly secured an agreement from Pickrell for a deed that would transfer

the property to him individually to the exclusion of Frost. At the time he entered into this agreement he was the trusted agent of the plaintiff, and it was only by the violation of duties that he owed to Frost that he could secure a personal advantage to Frost's detriment. In a similar case to the one at bar—*Miller v. O'Boyl*, 89 Fed. 140—the court held: "In this matter he was the trusted agent of the plaintiff. If it was open to him at all to throw off his agency and acquire the contract for himself, he could only do so after the frankest disclosures to the plaintiff of all the circumstances, and distinct notice of his intentions to act in his own behalf, to the exclusion of the plaintiff."

The observations of Chief Justice Gibson in *Bartholemew v. Leech*, 7 Watts, 472, in respect to the incapacity of a confidential agent to acquire title in hostility to his principal, are very pertinent here: "To capacitate him as a purchaser on his own account, he must have explicitly resigned his trust. The most open ingenious and disinterested dealing is required of a confidential agent while he consents to act as such, and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt in this respect is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar, or so accordant with common honesty." The principle which lies at the foundation of this and all similar cases is that: "Equity will not allow one to profit by the violation of his own duty. Where a duty rests upon one party in respect to the property of another, the violation of or omission of which will result in the sale of the property, the person owing that duty is absolutely disqualified from becoming a purchaser at such sale for his own account." *Bennett v. Austin*, 81 N. Y. 322. Davies, under the law, was, by the conditions under which he acted, constituted a trustee for the benefit of himself and Frost, and the sole effect of his conduct was to make himself, instead of

Frost, the holder of the option in the interest of both. Frost is authorized to treat the subject-matter of the trust as if no change had been made in the situation. In this situation the conveyance of Davies transferred to the company the interests of both him and Frost, and in equity amounted to exactly the same as if Frost had himself made the conveyance; and by such conveyance Frost became entitled to receive from the company the consideration which was fixed for his interest, namely, 200,000 shares of stock. Of this situation the company had full knowledge. Davies was himself president of the company. The other members of the board of directors had full knowledge of the whole situation, of the company's agreement with Frost for the transfer of the property on these terms, and of the manner in which Davies had substituted himself for Frost in the instrument of conveyance; and when the company accepted the conveyance of Frost's interest the board of directors joined with the president of the company in the transaction while cognizant of all the facts and of the rights and equities of Frost. When knowing Davies' relation to Frost, and knowing that he intended to keep all the stock and give Frost nothing, the company gave Davies 200,000 shares of stock belonging to Frost, and paid him Frost's expenses, it rendered itself equally liable to Frost in this action. The judgment in this case, based upon the value of the stock at the time Frost became entitled to it, as found by the court, seems eminently proper, and is abundantly sustained by the facts as shown in the record.

The judgment of the lower court is therefore affirmed.

STREET, C. J., and DAVIS, J., concur.

ELIZABETH J. HARRIS v. EUGENE M. COBB ET AL.

(49 West Virginia 350; 38 S. E. 559. Supreme Court of Appeals.
March 23, 1901.)

Reservation of perpetual royalty. M. and husband conveyed by deed to H. 52 acres of land in fee, which deed contained this provision: "The parties of the first part reserve unto themselves, and do not convey by this deed, the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the tract of land hereby conveyed." *Held* to be an exception from the operations of said deed, reserved to the grantors, of the title in fee to the one-sixteenth of the oil in place in and underlying said tract of land, and to be delivered to her when produced as royalty, without expense to her for production.

Oil lease held subject to double royalty. H. afterwards leased said tract of land to L., with the exclusive right to operate and drill for oil and gas, reserving one-eighth part of all the petroleum obtained from said premises as produced in the crude state, to be set apart in the pipe line running said petroleum to the credit of lessor. *Held* to be a reservation to the lessor of the one-eighth of the oil which was vested in her, and did not refer to or include the one-sixteenth which was outstanding in M.

Appeal from Circuit Court, Tyler County; G. W. FARR, Judge.

Bill by Elizabeth J. Harris against Eugene M. Cobb and

Land was sold by general warranty with no reservation of mineral, the vendee however knowing that the coal underlying had been previously conveyed to another and the price paid was the value of the surface right only: *Held*, a case for reformation of the deed. *Stafford v. Giles*, 135 Pa. 411; 19 Atl. 1028.

A reserve of the "profits" of coal in the land sold construed to be a reservation of the coal itself. *Weakland v. Cunningham*, (Pa.) 7 Atl. 148.

The reservation of "the entire privilege of all ore on said premises" construed as an exception. *Thompson v. Mattern*, 115 Pa. 501; 9 Atl. 70.

others. Decree for plaintiff, and defendants appeal. Affirmed.

P. A. SHANOR, A. B. HUNT and DAVID STERRETT, for plaintiffs in error.

T. P. JACOBS and E. L. ROBINSON, for defendant in error.

McWHORTER, J. By deed dated July 25, 1896, Rachel A. Myers and James Myers, her husband, conveyed with general warranty to Elizabeth J. Harris, the wife of B. F. Harris, a tract of about 52 acres of land in Tyler county, which deed contained the following clause: "The parties of the first part reserve unto themselves, and do not convey by this deed, the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the tract of land hereby conveyed;" which deed was recorded in the clerk's office of the county court of Tyler county on the day of its date. On the 23d day of January, 1897, Elizabeth J. Harris and her said husband, by deed of lease of that date, granted to James Lowry the exclusive right to operate and drill for petroleum and gas, to lay pipe lines, etc., on the said tract of land, for the period of five years from the date of the lease, and so long thereafter as oil or gas could be produced in paying quantities.

"The party of the second part (James Lowry), his heirs or assigns, agrees to give the party of the first part one-eighth part of all the petroleum obtained from said premises as produced in the crude state, the said one-eighth part of the petroleum to be set apart in the pipe line running said petroleum to the credit and for the benefit of the said party of the first part."

James Lowry, by deed of assignment, transferred and conveyed the same to James S. Glenn and Eugene M. Cobb, who assigned a portion thereof to L. E. Mallory. The last three

named took possession and operated said leasehold, and produced oil in paying quantities. On the 29th of January, 1898, Elizabeth J. Harris, L. E. Mallory, E. M. Cobb, and James S. Glenn executed a division order, whereby they certified their ownership of the wells on the said leasehold, and authorized the Eureka Pipe-Line Company until further notice to receive for transportation and storage oil from said wells for said parties in the proportions named, to-wit., to Elizabeth J. Harris $\frac{1}{8}$ royalty, to L. E. Mallory and E. M. Cobb each 7-32, and James S. Glenn 14-32, subject to their usual terms and conditions. Elizabeth J. Harris filed her bill in the circuit court of Tyler county against Eugene M. Cobb, James S. Glenn, L. E. Mallory, Rachel Myers, James Lowry, and the Eureka Pipe-Line Company, alleging the facts aforesaid, claiming under the reservation or exception in the said lease the one-eighth of all the oil produced in the crude state, to be set apart in the pipe lines to her credit; that by the reservation in the said deed from Rachel A. Myers and husband the said Myers is entitled to another one-sixteenth of all the oil produced or to be produced from said tract of land; that, notwithstanding her right to receive the full one-eighth of all the oil so produced, and notwithstanding the division order in which said Cobb, Glenn, and Mallory agreed that she should receive the one-eighth, yet they have not delivered the same to her, nor have they permitted the Eureka Pipe-Line Company to deliver the same to her, but have induced said company to refuse to so deliver it to her; and prays that the defendants Cobb, Glenn, and Mallory, and each of them, be required to answer her said bill, and be required to discover, say, and disclose how much petroleum oil has been produced from said tract by them, or either of them, and the value thereof at the respective times when produced and run into the pipe lines of said company, and that they, and each of them, may discover, say, and disclose to the court the amount of the royalty oil, to-wit., the one-

eighth royalty and the value thereof, belonging to plaintiff, produced and run into said pipe lines, and which they refuse to deliver, that she have a decree therefor; and that said defendants be required to perform, abide by, and execute the covenants and agreements contained in said lease; and that a special receiver be appointed, if necessary, to receive and take charge of said royalty oil under the direction of the court; and for general relief,—which bill was sworn to. The defendant Lowry demurred to the bill, and filed his answer, and defendants Cobb, Glenn, and Mallory filed their joint demurrer and answer, and Rachel A. Myers filed her demurrer and answer, in all of which demurrers plaintiff joined, and to the answers replied generally. The deposition of B. F. Harris was taken and filed on behalf of plaintiff, and on the 17th day of August, 1899, the cause was heard upon the said pleadings, the bill taken for confessed as to Eureka Pipe-Line Company, when the court overruled the demurrers, and ascertained that by the deed of July 25, 1896, the defendant Myers, in conveying the tract of about 52 acres of land to plaintiff, Harris, excepted and did not convey the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the said tract of land; that plaintiff, Elizabeth J. Harris, by her lease of January 23, 1897, to James Lowry, leased and demised to said Lowry the said tract of land for the purpose of drilling and operating the same for the production of petroleum oil and gas, in which she reserved, and the said Lowry agreed to give and yield to her, the one-eighth part of all the oil produced and obtained from said land as produced in the crude state, to be set apart to her credit in the pipe lines; that said Lowry assigned and transferred said lease to the defendants Cobb and Glenn, and subsequently, and before this suit, said Cobb and Glenn assigned and transferred an interest therein to said Mallory, and that the three last-named defendants, in pursuance of said lease, entered upon and developed said

tract, and produced therefrom oil in paying quantities; that said operators have never delivered or paid any royalty of such oil to any one, and ascertaining that of the oil produced and to be produced from said land Rachel A. Myers is entitled to the 1-16, the plaintiff, Elizabeth J. Harris, to $\frac{1}{8}$ of 15-16, and the defendants Cobb, Glenn, and Mallory to the remainder thereof,—that is to say, that Rachel A. Myers is entitled to 8-128 of such oil, plaintiff to 15-128, and the said Cobb, Glenn, and Mallory together to 105-128,—and decreed its distribution accordingly; and it was decreed that the Eureka Pipe-Line Company deliver and pay over to said parties in said proportions the oil hereafter to be run into said pipe lines, and that of the royalty oil now in the pipe lines said company should deliver to plaintiff an amount equal to 15-128 of all oil produced from said land and run into said lines, and shall then pay and deliver to said Rachel Myers the remainder, or 8-128, of the whole of said oil, if there be so much in the pipe lines, it being intended to dispose of the royalty oil accumulated during the pendency of the suit. The cause was referred to a commissioner to ascertain and report the amount of oil produced from said land and run into the pipe lines, the value thereof, and to whom the same has been paid and delivered, and in what proportion, and, on motion of plaintiff, K. S. Boreman was appointed a special receiver of the royalty oil, 3-16, to take charge of and sell the same at the best price obtainable, when and as often as, in his judgment, should be prudent. From this decree the defendants Eugene M. Cobb, James S. Glenn, and L. E. Mallory appealed, and say the court erred in decreeing that Elizabeth J. Harris is entitled to more than her proportionate part of the one-eighth of the oil reserved in her deed of lease.

The question to be settled here is, what share of the royalty is Elizabeth J. Harris entitled to receive? Rachel A. Myers had conveyed to her in fee the 52 acres of land, which con-

veyance had in it this provision: "The parties of the first part reserve unto themselves, and do not convey by this deed, the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the tract of land hereby conveyed." Before making this deed, Mrs. Myers was invested with the title in fee to the whole. By that clause she remained so vested with the title to one-sixteenth of the oil. The language is not ambiguous,—a plain statement that this proportion of the oil was reserved, and not conveyed; and she held that part so reserved and not conveyed precisely as she had held the whole tract up to that time, and by the said deed the title to the whole tract, and every part thereof, except the one-half of the one-eighth of the oil so reserved and excepted was vested in Mrs. Harris, and over the whole premises and every part thereof, except this reservation and exception, Mrs. Harris had absolute control. A conveyance by Mrs. Harris of the whole tract without mention of the reserved and excepted one-sixteenth part of the oil retained by Mrs. Myers would in no wise disturb or affect the right or title of Mrs. Myers. Mrs. Harris' deed was a matter of record. The fifteen-sixteenths of the oil was vested in fee absolutely in Elizabeth J. Harris, and a sale by her of the same with a reservation and exception of any designated part or proportion of it could not apply to that which she never had, but was still vested in her vendor. Any reservation or exception made to herself must be of her own. How could she reserve to herself that which she never owned? In *Baker v. McDowell*, 3 Watts & S. 358, B., who was seised in fee of a tract of land, subject to an outstanding title to one-half of all iron ore found in the premises, conveyed the same to H. in fee, "excepting and reserving to the said B., his heirs and assigns, the one-half of all iron ore found on the land." Held to be a reservation to the grantor himself of that half of the ore which was vested in him, and

not a mere notice or reservation of the other half which was outstanding.

It is contended by appellants that the reserving clause in the deed from Myers to Harris is simply a reservation, and not an exception; that it did not reserve any of the oil in place, but "reserved a one-half of the usual royalty of one-eighth of said oil when produced." The language of the reservation does not warrant such construction. "The parties of the first part reserve unto themselves, and do not convey by this deed, the one equal one-half part," etc. The parties were conveying real estate, and their declaration that they were not conveying or intending to convey a certain part of a substance as much a part of the real estate as the soil itself, and as much a subject of transfer by deed as coal, iron, or other mineral, clearly made it an exception. It might have been different if the reservation had been expressed, as appellants would have it,—that she "reserved a one-half of the usual royalty of one-eighth of said oil when produced." This might have been construed to mean a reservation to take effect only when the tract was developed and the oil produced, but it was excepted from the effect of the deed, and the absolute title to the one-sixteenth of the oil remained in the vendor. Describing it as royalty did not change the character of the substance. Yet the use of the word "royalty" carries with it a right to have the same delivered to her without expense of production. "An exception in a deed is always part of a thing in being and a part of the thing granted; while a reservation is of a thing not in being, and is newly created,—as rent and the like. An exception withdraws from the operation of the conveyance some part of the thing granted, which, but for the exception, would have passed to the grantee under the general description; while the reservation is the creation in behalf of the grantor of some new right issuing out of the thing granted,—that is to say, some-

thing which did not exist as an independent right." *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932. As in that case, there can be no doubt that the words expressed in the deed that they "do not convey by this deed" the part of the oil to which they retain title amount to an exception, the thing excepted from the grant being a certain part of the oil, which proved to be the chief element of value of the property conveyed. The oil so excepted remained in the grantor in the same right as before the grant, and, being a subject of grant and exception, when excepted in the deed, became a separate and distinct inheritance. *Barringer & A. Mines & M.* 84.

In *Baker v. McDowell*, cited, Chief Justice Gibson, says: "The reservation of Blair's heirs was therefore unnecessary to secure anything but their own moiety of the ore; certainly not to apprise their grantee of the existence of Henderson's reservation, of which, lying as it did in the channel of the title he was purchasing, he was bound to take notice. It is possible they may have been so far mistaken in their judgment of the law as to think otherwise, but in that case why declare the reservation to be, not for Henderson, but for themselves? If the purpose was to show conclusively that his (Henderson's) part of the ore was not intended to be conveyed, the obvious way to effect it was to convey the land expressly subject to his interest in it. A clause to that effect would have evinced an intent not to be mistaken, but that this reservation was introduced to except what did not belong to the grantors is altogether improbable. Why reserve that which they had no power to pass? Were we at liberty to weigh probabilities, we would have more reason to think that they actually intended to reserve the moiety of the ore for their own use than that they intended to guard themselves from future difficulty in regard to the prior reservation; but, though the deed is to be interpreted so as to accord as nearly as may be with the apparent intent of the parties, we are not to be governed by conjecture in regard to the

actual state of it. We are furnished with guides to greater certainty of result, and at least an equal chance to reach the actual meaning. * * * Now, by referring this reservation to Henderson's moiety, we would deprive it of its power, for his reservation had left nothing remaining but the other moiety, to be the subject of another exception; but by referring it to that other moiety we put all the parts of the instrument in harmonious action. Its legal effect, therefore, is to except from the grant that which is susceptible of exceptions, the part of the ore which was the property of the grantors." When Elizabeth J. Harris executed the lease to James Lowry, he agreeing to give her the one-eighth part of the oil obtained from said premises as produced in the crude state, it could have had no reference to the estate outstanding in Rachel Myers, but to that alone vested in the lessor. The estate of Mrs. Harris was well defined. The lessee not only had constructive notice of the reservation and exception in the deed of Mrs. Myers by its recordation, but he had actual notice of it; said he "knew just what there was in it" (the deed); and Cobb and Glenn had the clause in the deed specially called to their attention, and had actual notice of it, if that were necessary. Appellants contend that the lease from Harris to Lowry granting him the exclusive right to operate for oil and gas for the consideration of one-eighth royalty was, in effect, granting to Lowry and his assigns seven-eighths of the oil produced, and she had the right to make such conveyance, as the title to fifteen-sixteenths of the oil and gas under the premises was undeniably hers. I presume, being the absolute owner of fifteen-sixteenths of all the oil in the premises, Mrs. Harris could have conveyed seven-eighths. But did she? is the question in this case. Her interest was a subject of contract. Lowry knew what she had, and also was perfectly cognizant of what portion of the oil was still vested in Mrs. Myers, and their interests were distinct and separate, and they were as strangers, and it was

perfectly competent for Lowry to deal with either of them separate from the other, and this is what he did in purchasing seven-eighths of Mrs. Harris' oil, and leaving the interest of Mrs. Myers in her hands, to be settled for.

The second assignment of error is that the court erred in decreeing a priority in favor of Mrs. Harris over Mrs. Myers for the oil in the pipe lines now designated as "royalty." In response to this Mrs. Myers is not here complaining of the decree, and appellants are not prejudiced by it; and, further, it is hard to conceive how there could be a shortage, as it is a division of oil, the amount of which is certain.

The third assignment, that the court erred in appointing a special receiver, is not mentioned in the brief of appellants, and I take it they do not rely upon that point, and the circumstances of the case seem to make such appointment proper.

The fourth and last assignment is, in substance and effect, the same as the first.

I think the decree of the circuit court is right, and it is affirmed.

DENT, J. The lease in this case from Mrs. Harris to James Lowry does not, as in the ordinary oil and gas lease, grant the oil, but only grants the privilege of searching for oil, and, if it is found, the grantee agrees to give her "the one-eighth part of all the petroleum obtained from said premises as produced in the crude state." There is no provision made as to the other seven-eighths, except impliedly the lessee is to retain it, and she releases any claim to it in accepting the one-eighth. There is nothing said in the lease with regard to Mrs. Myers' reservation, as it appears to be of a sixteenth royalty, rather the one-sixteenth of the oil in place; for, if it was an exception of the oil in place, she would have to pay one-sixteenth of the expense of producing it, which the reservation by use of the term "royalty" forbids.

There being no grant of the oil, a warranty could not be implied, and the lease cannot be construed to be anything else than the privilege of the retention of seven-eighths of the oil in so far as Mrs. Harris is concerned. One-eighth she is to have. This she bargained for, and of this the law does not, and the court ought not, to deprive her by construing the contract contrary to its express terms. Three times during the present term this court has held that parol evidence is inadmissible to vary, contradict, or explain a written contract unambiguous on its face (*Buena Vista Co. v. Billmyer*, 37 S. E. 583; *Knowlton v. Campbell*, Id. 581; *Camden v. McCoy*, Id. 637), and now it is proposed by mere construction to vary a written contract which is plain and unambiguous on its face by making it read instead of one-eighth of all the oil produced, one-eighth of the fifteen-sixteenths of the oil produced, thus substituting "fifteen-sixteenths" for the word "all." The word "all" is very expressive, and there is nothing ambiguous about it. Then why break the rules of construction, and make a new contract between the parties? Mrs. Harris was to have one-eighth of the oil when found, as consideration for the privilege of searching for it. One-sixteenth of it was already Mrs. Myers'. And the lessees have the right to retain the residue thereof; only impliedly, however, for they have no direct grant of it from any one. The decree should be amended so as to give Mrs. Harris her full one-eighth and Mrs. Myers one-sixteenth, and the residue, thirteen-sixteenths, to the appellants, and, as amended, affirmed.

Mrs. Harris, through her attorneys, having waived the right to have the decree amended in her favor, I concur in the affirmance of the decree as it was pronounced in the circuit court.

Affirmed.

BRANNON, P. (for reversing). Mrs. Harris leased all the

oil in the tract of land to Lowry. When she did so, there was paramount title in Mrs. Myers to a sixteenth of the oil, and thus the implied warranty which exists in a lease for good title was that instant broken, and Lowry or his assignees cannot be called upon to pay Mrs. Harris the full rent of one-eighth, and besides pay Mrs. Myers her sixteenth also, and thus make Lowry pay rent as if he got the whole of the oil, and yet lose a sixteenth by reason of failure of title in the lessor. Lowry only agreed to pay Mrs. Harris one-eighth of the oil in consideration of getting all the oil, and, not getting it, he should not be compelled to pay the full rental to Mrs. Harris. She should discharge that incumbrance to Mrs. Myers. I hold that Mrs. Myers is entitled to one-sixteenth of the oil, Mrs. Harris to one-sixteenth, and Cobb, Glenn, and Mallory the balance. The case of *Baker v. McDowell*, 3 Watts & S. 358, was a conveyance with special warranty, while here there is a general warranty

KLEPPNER V. LEMON.

(198 Pennsylvania 581; 48 Atl. 483. Supreme Court. March 25, 1901.)

¹Lessee draining the demised ground by wells on adjoining ground.

Measure of damages. Where a lessee instead of drilling a well and operating the land in accordance with the lease, drills a well on adjoining property which he controls, in such a way as to drain the oil and gas from under the leased land, the measure of the lessor's damages is royalties on a portion of the oil produced through the well, ascertained by comparing it with the total production through the well, in the same proportion as the lessee's land within the circle drained bears to the whole area of drainage, the oil producing capacity of every part of the area being the same.

In such a case the rule as to the wrongful confusion of goods should not be applied so as to give to the plaintiff royalties on all of the oil produced through the well, it being possible approximately to determine the amount of oil drawn from the lessor's land.

On reargument. Decree modified and affirmed.

¹In the original case, 18 M. R. 404, the court held that defendant must sink another well or surrender all his leased ground except the one well sunk and a limited protection around it. He elected not to sink the second well. On reference to a master he was ordered to pay full royalty on all oil taken from the adjoining Stotler farm, the same as if it had been taken from the ground demised to defendant by the plaintiff on the rule applied to cases of wilful confusion of goods and this decree was affirmed in 197 Pa. 430. The text case now overrules the holding in 197 Pa. 430 and allows royalty on only so much oil as the court believe to equitably belong to the demised ground.

The original case held that the lessee should sink wells enough to prevent drainage from the demised ground. Failing so to do, he must surrender all the ground except that drained by the first well which decree fixed at so many feet. The text case now compels him to pay royalty on what he took from the Stotler well which might have been drained from the leased ground, and discards the former decree as adjudicating finally the rights of plaintiff upon the question of how much protection the one well of the lessee defendant was entitled to. See *Harris v. Ohio Oil Co.* 19 M. R. 157.

On the doctrine of protection see *Allison & Evans App.* 11 M. R. 142.

For former opinion, see 197 Pa. 430; 47 Atl. 353.

D. F. PATTERSON, for appellant.

W. G. GUILER and M. A. WOODWARD, for appellee.

FELL, J. We ordered a reargument of this case because we were not satisfied that a right conclusion had been reached by the learned master as to the amount for which the defendant was liable by reason of his failure to develop in good faith the land which he has leased of the plaintiff for the production of oil. By the decree made, the plaintiff is allowed a royalty of one-eighth of all the oil produced from the Stotler well No. 2, which was on an adjoining farm, and 157 feet from the plaintiff's line. The reason stated in support of the decree is that, as it was not possible to ascertain with accuracy the amount of oil which had been unlawfully drained from the plaintiff's land and mingled with the defendant's oil, the rule in relation to the wrongful confusion of goods should be applied, and the whole given to the plaintiff. The application of this rule under the circumstances is, we think, harsh, and unwarranted. The rule applies only in cases of necessity, where the goods cannot be distinguished or separated. 2 Bl. Comm. 405; 2 Kent Comm. 365. "It is only the impossibility of distinguishing goods intermingled with others that transfers the title to the whole to the one who is innocent of the admixture." *Winlack v. Geist*, 107 Pa. 297.

The proper measure of damages was the market value of one-eighth of the oil taken from the plaintiff's land and brought to the surface through the Stotler well. The basis of the decree is the reasonable probability, because of the nature of the soil, the proximity of the well to the plaintiff's land, and the effect produced on this well by the flow of other wells in the vicinity, that a part of the oil produced came

from the plaintiff's land. As it came by drainage from the porous rock within 500 or 600 feet of the well, it is not more difficult to determine approximately the amount taken than it is to determine that any was taken. Presumably, the drainage was uniform, and the plaintiff's land contributed a part which bore the same proportion to the whole amount produced as his land within the circle drained bore to the whole area of drainage. This proportion is about 1 to 8, and the defendant should not be held liable for more than one-eighth of the royalty on the whole. The damages awarded by the decree are reduced to \$444.91.

With this modification the decree is affirmed, at the cost of the appellant.

JAMES E. MALONEY ET AL. v. SILAS F. KING ET AL.

(25 Montana 188; 64 Pac. 351. Supreme Court. April 1, 1901.)

Where errors specified were not argued or referred to in the brief on appeal, they are waived.

Intimation of pre-judgment by court. Where, during the examination of a witness for defendants on an application for an injunction, the judge remarked that an injunction pendente lite would be granted on the evidence then before the court, such action does not constitute reversible error, he having heard the whole case before finally deciding that such injunction should issue.

¹**The action of the court below in acting on the evidence as to granting the writ of injunction will be followed unless it clearly appears that he abused his discretion.**

²**Burden of proof in apex case.** Where defendants are working within their vertical lines the burden of proof is on the party alleging that he has an apex entitling him to follow the vein into defendant's ground. Prima facie such party is a trespasser.

³**Although the evidence in favor of the apex might not be considered sufficient upon final hearing it may be sufficient to sustain a temporary injunction.**

Appeal from District Court, Silver Bow County.

¹A mining injunction is largely a matter of discretion. *Anaconda Co. v. Butte Co.* 17 Mont. 519; 43 Pac. 924.

The rule that the discretion of the court below in granting or refusing an injunction cannot be reviewed on appeal has no application to the granting or refusing an injunction after the final hearing on the merits. *Gold Tel. Co. v. Commercial Tel. Co.* 22 Fed. 838.

On conflicting testimony it is no abuse of discretion to enjoin mining. *Parrot Co. v. Hetnze*, 21 M. R. 98.

Equity will enjoin trespassers where plaintiffs title has been once adjudicated. Where the question grave and the loss to plaintiff serious if relief denied, preserving injunction ought to be sustained. *Dimick v. Shaw*, 20 M. R. 49.

²Parties working beyond side lines are prima facie trespassers. *Cheesman v. Shreve*, 16 M. R. 79.

It is abuse of discretion to allow an injunction on the mere chance that the vein worked would apex in plaintiff's ground. *Montana Co. v. Boston Co.* 20 M. R. 1.

³Case strong enough for temporary injunction not necessarily as

WILLIAM CLANCY, Judge.

Action by James E. Maloney and others against Silas F. King and Wakeman Sutton, impleaded with Marcus Daly and others. From an order granting an interlocutory injunction, defendants King and Sutton appeal. Affirmed.

McBRIDE & McBRIDE and E. N. HARWOOD, for appellants.

McHATTON & COTTEE, for respondents.

PIGOTT, J. This is an appeal by the defendants King and Sutton from an order granting an interlocutory injunction.

The Plymouth lode mining claim is owned by the plaintiffs. Title to the Silver King lode mining claim is in the defendants Daly, Murray, and King. The Plymouth adjoins the Silver King on the south. The plaintiffs commenced an action against the defendants by which they seek to recover a judgment for \$150,000, the value of ores alleged to have been mined, extracted, and converted by the defendants from the Plymouth claim, and to obtain an injunction restraining them from entering upon that part of the Plymouth which lies west of a vertical plane passing through a point on the north side line of the claim 405 feet distant from the northeast corner of the claim, the plane extending south, seven degrees west, across and vertically downward through the Plymouth claim; and from mining, carrying away, or converting to their own use the ores and minerals

strong as would be required for permanent. *Buskirk v. King*, 72 Fed. 22.

Relative degree of injury is not to be considered when it is evident that complainant has no case. *Pioneer Co. v. Shamblin*, 140 Ala. 486; 37 So. 391.

therein. The defendants deny that they have entered into the Plymouth claim, or have mined, carried away, or converted any minerals or ores therefrom, and aver that the defendants Daly, Murray, and King are the owners of the Silver King claim, in which there is a vein the apex whereof is wholly within the exterior boundaries of the claim; that the end lines are parallel; that the defendants followed the lead upon its dip to the southward, and within the vertical planes of the end lines of the Silver King claim, continued in their own direction; that these acts of the defendants constitute the alleged acts of trespass of which the plaintiffs complain; that the defendants are the owners of the vein throughout its entire depth between the vertical planes of the end lines of the Silver King claim extended downward and continued in their own direction,—in other words, the defendants aver that they possess extralateral rights as against the plaintiffs. An order was issued to show cause why an interlocutory injunction should not be granted. After a hearing, the court, on the 31st day of May, 1900, granted an injunction order as prayed for, and from that order the present appeal has been taken.

The specifications of error are seven in number, but the only one which is argued or elsewhere referred to in the brief relates to the question whether the evidence was sufficient to justify the making of the order. The other supposed errors, although specified, must, therefore, be deemed to have been waived. They will not be considered.

The contention of the plaintiffs is, in substance, that the vein on which the defendants were mining in the Plymouth has its apex in that claim, and that, if the apex is in the Silver King, the vein, on its strike, crosses both side lines of the last-named claim, in which event—the side lines becoming the end lines—the right to follow the vein on the dip is limited to an area bounded by the vertical planes of the side end lines projected in their own direction. The chief con-

tention of the plaintiffs is that the vein in the Plymouth claim on which the defendants were working is a different vein from the one which the defendants insist has its apex in the Silver King claim. The defendants contend, on the other hand, that in mining the vein within the surface boundaries of the Plymouth they have followed on its dip a vein apexing in the Silver King.

During the examination of a witness for the defendants the judge presiding remarked that an injunction pendente lite would be granted upon the evidence which was then before the court; saying, among other things, to counsel for the defendants: "But, if you want to get evidence here to appeal or to have it reviewed, you can do so, but I shall issue the injunction on the testimony that has been given here, for the reason, as I tell you, that I have been doing it in all of these cases, and it is my duty to do it. The supreme court has affirmed these decisions." The defendants were then permitted to introduce their evidence. Judges should endeavor to avoid reaching or announcing conclusions in contested cases before hearing both parties. This is obvious. The course pursued by the judge below was extraordinary, for, without hearing what further evidence the defendants might desire and be able to present, he announced his intention to grant the order prayed for. He could not judicially know whether the injunction order ought to be granted until the evidence of the defendants as well as that of the plaintiffs had been heard by him. This is also manifest. The court, however, heard all the evidence offered by the defendants, and, as must be presumed, considered it. The fact that the judge prematurely, or in advance, announced his intention to exercise his legal discretion in a particular way upon evidence to him seemingly sufficient, then before the court, does not constitute reversible error when he or the court (as the case may be) hears the whole case, and then decides. In the absence of a showing to the contrary, the presumption must

be indulged that the evidence was not rejected, but was considered, and had its due weight. Although the judge remarked, before the close of the evidence, that an injunction *ad litem* would be granted, the order of the court may nevertheless have been correct. Unless it clearly appears from a consideration of all the evidence that the court *a quo* abused its discretion in making it, the order appealed from must be affirmed. There was evidence tending to prove that the defendants, through underground workings from the Silver King claim, had entered into the Plymouth claim, had mined therein, had removed ore therefrom, and were threatening the continuance of such acts. The plaintiffs are the owners of the Plymouth, and as such they are, *prima facie*, entitled to everything beneath the surface of their claim. They may assert this *prima facie* title to prevent intrusion by those who do not show that they possess the right to enter. *Parrott Co. v. Heinze*, 25 Mont. 139, 64 Pac. 326. In the present case, as soon as it was proved or admitted that the plaintiffs owned the Plymouth claim, and that the defendants were mining within the vertical planes of its surface boundaries, and removing ore therefrom, and intended to continue doing so, the necessity arose for the defendants, if they would rebut or weaken the presumption arising from plaintiffs' ownership, to show, or introduce evidence from which it might be inferred, that they were proceeding by virtue of some right which they had; and to that extent, at least, the burden was upon them to adduce evidence tending to prove that the vein which they were mining within the vertical bounding planes of the Plymouth claim has its apex in the Silver King claim. On the final trial, however, the burden would doubtless be upon the defendants to establish by the preponderance of the evidence that the apex is in their claim. Having entered within the boundary lines of plaintiffs' mining claim, the defendants were *prima facie* trespassers. Although there was much evidence tending to show that the apex of the vein is in the

Silver King claim, there was some evidence tending to prove the contrary. While we do not decide that the evidence in behalf of the plaintiffs would be sufficient to support a perpetual injunction granted after a trial of the case upon its merits, we are of the opinion that under the circumstances the evidence was enough, for aught that the printed record discloses, to authorize the district court in its discretion to grant an injunction order *pendente lite*, even if the contention of the defendants that certain affidavits were without probative force or weight be conceded. From testimony which the court presumably believed it seems that at the time the hearing on the order to show cause took place the development had not progressed far enough to demonstrate the identity of the vein in the Silver King with the vein in the Plymouth, nor to show with certainty the location of the apex of the vein in controversy. It may not be held by this court that the evidence upon which an inferior court granted a temporary injunction against the mining and removal of ores or valuable mineral deposits was insufficient with respect to proof of title, unless it appear that the party obtaining the injunction has failed to establish a reasonable ground for the assertion of title by him. *Boyd v. Desrozier*, 20 Mont. 444, 52 Pac. 53; *Parrott Co. v. Heinze*, *supra*, and cases cited. Repeated perusals and careful consideration of the evidence as certified satisfies us that we should not declare the lower court to have abused its discretion in granting a temporary injunction, even though, on paper, the case made by the plaintiffs may not impress us as being strong.

Let the order be affirmed. *Remittitur* forthwith.

Affirmed.

REUBEN ST. J. CLEARY V. SIMON SKIFFICH ET AL.

(28 Colorado 362; 65 Pac. 59. Supreme Court. April 8, 1901.)

Holding during period of limitation. The provisions of R. S. U. S. § 2332, that where parties have held and worked a claim for a period equal to the statute of limitations, they may be entitled to a patent in the absence of any adverse claim was intended to allow a prima facie case for patent under Land Office procedure but is not available as a defense against an adverse claim based upon a conflicting location.

But proof of such possession may be sufficient to assume that a valid location of the claim so occupied had been made.

¹**Running the lines of a lode claim over a prior mill site is not an initiation of title by trespass.**

²**A mill site cannot be located upon mineral land nor can it be subsequently patented upon mineral land whether the mill site be a separate application or applied for in connection with a lode.**

Test of value. Time. To sustain the contention that it is upon mineral land, the lode claimant must show that it contains sufficient mineral of such value as to justify working at the date when the mill site was located.

A district rule, although adopted prior to the Mining Acts, must yield to the latter and cannot allow of the location of a mill site upon mineral land.

Proof of claim on vacant public domain. As the location of a mining claim must be upon the unoccupied public domain and there is no proof that the plaintiff's location was upon unappropriated mineral lands the defendant was entitled to an instruction that plaintiff could not recover.

The water right an easement only. A vested right to the use of water for milling purposes carries with it the appurtenant right of way for a ditch through which to divert the water to the place of use, but it does not carry with it as an appurtenance a right to the land on which the mill is constructed.

Appeal from District Court, Gilpin County.

¹*Del Monte Co. v. Last Chance Co.* 19 M. R. 370.

²Only non-mineral land can be appropriated as a mill site. *Mon-grain v. Northern Pac. R. R.* 18 L. D. 105.

Action by Simon Skiffich and another against Reuben St. J. Cleary. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

The subject-matter of controversy in this case is the area in conflict between the Zara lode-mining claim and the Ar-righi mill site. Application for patent having been made for the latter, the owners of the lode claim filed an adverse, and in support thereof commenced this action against the applicant for patent on the mill site. The judgment below was in favor of the plaintiffs. The defendant appeals.

J. W. WOTEN, WILLARD TELLER and MORRISON & DE SOTO, for appellant.

J. McD. LIVESAY, for appellees.

GABBERT, J. One of the defenses interposed was a special plea to the effect that defendant and his grantors had held and occupied the mill site uninterruptedly down to the time of the location of the lode claim for a period equal to the statute of limitations of this state, which defense was based on the provisions of section 2332 of the Revised Statutes of the United States, which is as follows: "Where such person or association, they and their grantors, have held and worked their claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim.

To this plea a demurrer was interposed and sustained. The object of this section was to permit a party applying for patent to make a prima facie case before the land office by proving that the claim upon which the application for patent

was made had been in the possession of himself and grantors for a period equal to the statute of limitations of the jurisdiction in which the claim was situated, provided no adverse claim was interposed. In other words, proof of possession for the statutory period, in the absence of any adverse claim, was to be taken by the land department as equivalent to an establishment in detail of all the facts necessary to constitute a valid location. The statute, therefore, is not available in an action brought in support of an adverse against an application for patent; for its language necessarily implies that possession in the applicant for the statutory period is of no avail as against an adverse claim based upon a conflicting location (*McCowan v. McLay* [Mont.] 40 Pac. 602), except it might be in such action that proof of such possession would be sufficient upon which to presume that all steps necessary to effect a location of the claim adversely had been taken. (*Harris v. Smelting Co.*, 12 Morr. Min. R. 178: 8 Fed. 863.)

This question, however, is not material. If it be necessary to plead the statute in question, in order to take advantage of its provisions, defendant was not prejudiced by the action of the court in sustaining the demurrer, for the reason that he established, by testimony which was undisputed, that all acts necessary to constitute a valid location of his mill site had been performed.

A plea of defendant was also interposed to the effect that the land described in the complaint was not, at the time it was located as a lode claim, subject to location, for the reason that it was then actually occupied for a mining purpose by the defendant. On motion of plaintiffs, this plea was stricken out. It is urged by counsel for defendant that title to a mining claim cannot be initiated by a trespass. The lode claim was discovered without the lines of the mill site. Its boundaries, as fixed, did embrace a portion of the latter. These facts appear from the pleadings. In such circumstances,

the act of the plaintiffs in projecting the boundaries of their claim so as to include a part of the mill site was not a trespass, and the motion to strike was well taken.

The mill site was located in 1860, and ever since that date, down to the time of the location of the lode claim, in 1895, was in the uninterrupted possession of the defendant and his grantors, who had erected a three-stamp mill thereon about the time of the location, which was subsequently enlarged, and has been operated from the time of its construction. Over \$16,000 has been expended by defendant and his grantors in the way of improvements. The jury found that the vein of the lode claim intersected the mill site. There is no question that a vein was discovered on the lode claim upon which its location is based, and that such vein carries mineral in appreciable quantities. The vein in question appears to have been known since about 1884, but no ore has ever been shipped therefrom, nor has there ever been any attempt to operate it as a mine. Its values are shown by assays only, which, with one exception, established that they are merely nominal. The mill site is not located in connection with any mining claim. The district rules in force in the Enterprise mining district in which the property in controversy is situated, passed in 1860-61, provided for the location of mill sites, and that locations for this purpose shall be valid as against all other classes of claims. The mill site in question was located under these rules, and in compliance with their provisions. The court instructed the jury, in substance, that it is sufficient if the discovery shaft discloses a vein or crevice such as a miner would be willing to open or follow, that it made no difference what the size or value of such vein might be, that non-mineral land only can be taken for mill-site purposes, and that, in case of adverse suit by a lode-mining claim against a mill site, the latter must give way to the former, provided it is shown that the vein crosses or intersects the mill site, and it is further shown that the lode claim is a

valid, subsisting location. On behalf of the defendant the court was requested to direct the jury that a lode claim, under the terms of the act of congress authorizing its location, must be upon a valuable mineral deposit, which was refused.

On this record, counsel for defendant contend (a) that a mill site of the class under consideration need not necessarily be located upon non-mineral ground; (b) that, as against the mill site, the ground in controversy could not be held as a mining claim unless it appears that it contains mineral sufficient in quantity and quality to justify extraction; (c) that, under the district rules of Enterprise mining district, defendant has a vested right to the mill site.

(a) For the location of mill sites, congress has provided that non-mineral ground not contiguous to a lode claim, and used or occupied by the owner of such claim for mining or milling purposes, may be included in the application for patent to his lode claim, and patented in connection therewith, and also that the owner of a quartz mill or reduction works, not owning a mine in connection therewith, may obtain patent for his mill site. Section 2337, Rev. St. U. S. Under this section it is contended that the latter class of mill sites may be patented on mineral land. This view is not tenable. The object of the law is to permit title to land to be acquired for mill sites located on mineral lands which do not contain valuable mineral bearing veins or mineral deposits. There is no reason for a distinction on account of the character of use, or the ownership or non-ownership of a mine in connection with a mill site. The land department has uniformly held that a mill site cannot lawfully be located on mineral land containing valuable minerals, without any attempt to distinguish between the two classes. 1 Lindl. Mines, § 520.

(b) The definition of a vein, as given by the trial court, is a general one frequently adopted in contests between conflicting lode claims. Like all general rules, it must be rea-

sonably applied; for cases will arise, under peculiar facts, which create an exception. A mill site is a mining location, but the land which may be taken for that purpose is of a special character. The statute contemplates that title to lands for mill sites may be secured which are prima facie mineral, but which in fact are non-mineral, so the question presented is, what is the test by which to determine whether land so claimed is non-mineral or not, when a contest arises between a mill-site location and a lode claim subsequently located? Where lands designated as mineral have been claimed and located as agricultural, it has been held that the mere presence of gold in placer deposits, or the existence of a vein within the limits of the land so claimed, would not impress it with the character of mineral land. *U. S. v. Reed*, 28 Fed. 482; *Ah Yew v. Choate*, 24 Cal. 562; *Alford v. Barnum*, 45 Cal. 482; *Etling v. Potter*, 17 Land Dec. 424; *Cutting v. Reininghaus*, 7 Land Dec. 265; *Peirano v. Pondola*, 10 Land Dec. 536.

Contests have frequently arisen between placer and subsequent lode locations involving the question of whether or not the placer embraced within its limits "known lodes," which, under the provisions of section 2333, Rev. St. U. S., are excepted from placer patents. In such cases it has been held that a known lode is one known to exist at the time of application for patent, and to contain minerals in such quantity and quality as to justify expenditures for the purpose of extracting them. *Montana Ry. Co. v. Migeon*, 68 Fed. 811; *Iron Silver M. Co. v. Mike & Starr M. Co.*, 143 U. S. 394; *Brownfield v. Bier*, (Mont.) 39 Pac. 461.

In many other cases the question as to what constitutes mineral lands, as between the different classes of locations which may be made upon lands of that character, has been presented for determination, either before the courts or the land department; and, as to grants previously made, the holding has uniformly been that it is not every crevice or outcropping on the

surface which suggests the possibility of mineral that can be adjudged a known vein or lode, within the meaning of the statute, but that, in addition to this fact, it must appear that such lands embrace veins known at the time of the grant thereof to be sufficiently valuable for minerals to justify expenditures for their extraction. *Iron Silver M. Co. v. Mike & Starr M. Co.*, *supra*; *Dower v. Richards*, 151 U. S. 658; *Davis v. Wiebbold*, 139 U. S. 507; *Deffebach v. Hawke*, 115 U. S. 392.

These decisions are based upon the proposition that one claiming land as a mining location from which to extract minerals must establish, as against a prior location of another class, that the ground so claimed is valuable to operate as a mine, and, unless this does appear as a fact, he will not be permitted to take it from another who has previously located it in good faith for a different purpose. It has also been held, when this question was presented, that it is one of fact, to be determined by the jury before the *nisi prius* court. *Iron Silver M. Co. v. Mike & Starr M. Co.*, *supra*. This necessarily follows in actions brought in support of an adverse claim against an application for patent in those cases where by virtue of the provisions of sections 2325, 2326, Rev. St. U. S., an adverse is the remedy, instead of a protest, because the right of possession of the contesting parties turns upon the character of the land in controversy. The same principle and reasons which have been applied in determining the rights of rival claimants of land for agricultural or mining purposes, or as placer or lode claims, should control and determine the rights of contestants to the same premises when one claims as a mill site, and the other as a subsequent lode location. It is a well-known fact that lands designated "mineral" contain precious metals in small quantities, but not sufficient to justify the expense of attempting to extract them. It is not to such lands that the term "mineral," in the sense of the statute relating to mill sites, is applicable.

Davis v. Wiebbold, supra. Works for the reduction of ores are necessary. They must be located in the near vicinity of mines. Land for such purposes may be utilized, provided it is non-mineral. When that question is raised by those locating a lode claim embracing land already taken as a mill site, and upon which many thousands of dollars have been expended in the erection of mills, and which the claimant has taken up in good faith, the test must be, does such land contain minerals of a quantity and quality which can be extracted at a profit? 1 Lindl. Mines, § 98. If not, they are valueless for the extraction of minerals, and therefore non-mineral in their character, when previously claimed as a mill site. In such circumstances, that they are mineral must be established as a fact, and not as a theory. *Dughi v. Harkins*, 2 Land Dec. 721. To permit a claimant, under the guise of locating a lode claim, to take from another land already utilized for mill-site purposes which contains no minerals of sufficient value to justify extraction, and which would give to the lode claimant that which is of no value to him, except as he may convert it into a means to extort from the mill-site owner the payment of money to prevent the loss of improvements erected in good faith, would certainly be inequitable and unjust. The clear intent of congress was to permit the acquisition of title to land for mill-site purposes which was not valuable for mines, and the statute should be given this construction when it results in no loss to a subsequent *bona fide* lode claimant. Any narrower construction would result in rendering titles to mill sites previous to patent insecure, and the expenditure of money thereon in the erection of reduction works hazardous in the extreme, and at the same time reserve from use for mill-site purposes land which was of no practical value for any other.

In the circumstances of this case there is also presented for determination this further proposition, namely, as of what date must the mineral character of the mill site be as-

certained? When the validity of a grant depends upon certain conditions, it is the rule that such conditions are those existing as of the date the grant took effect. *Davis v. Wiebold*, *supra*; *Railroad Co. v. Migeon*, *supra*; *U. S. v. Reed*, *supra*; *Brownfield v. Bier*, *supra*.

Under the rules of the land department, where the application is for patent for a mill site only, as in this instance, there must be a mill or reduction works on such premises. *Le Neve Mill Site*, 9 Land Dec. 460; 1 Lindl. Mines, § 524. A mill-site claimant would certainly have a reasonable time after taking the necessary steps to legally locate his claim, within which to commence the erection of reduction works thereon. If not commenced within a reasonable time, then his rights would attach, as against other claimants, from the time he did begin construction of such works in good faith, and prosecuted them with reasonable diligence. Having vested and continued, the character of the land must be determined of the date his rights attached. The fact that such lands might contain mineral deposits which at a later date, by reason of changed conditions, could be mined at a profit, would not affect his rights. See authorities last above cited. The rights of the parties were therefore dependent upon the questions of fact presented by this proposition. Unless the premises in dispute did in fact contain mineral deposits of a value and quantity which, under the conditions existing at the time when the rights of the original owners of the mill-site premises attached, could have been extracted at a fair mining profit, they were non-mineral in character, and the jury should have been instructed accordingly. 1 Lindl. Mines, §§ 94-98.

(c) The district rules of Enterprise mining district, passed in 1860-61, provided for the location of mill sites without respect to the character of the land upon which they might be located. The territorial legislature in 1868 declared that all rights to any portion of the public domain

acquired prior to the 7th day of November, 1861, should be determined by the local law of the district in which such tract was situate, as it existed on the day such rights were acquired, or as thereafter may have existed. Section 3609, Mills' Ann. St. When congress passed the present law relating to mining claims, all rights to such lands were recognized to the extent that they had attached or been acquired under local rules or customs not inconsistent with the laws of the United States. Section 2319, Rev. St. U. S. The same act, as already noticed, provided that mill sites could only be legally located upon non-mineral lands. Section 2337, Id. Hence the rules of the district relating to the location of mill sites and the acts of the territorial legislature must yield to the act of congress, in so far as they relate to the location of such sites upon mineral lands, for in this particular they were inconsistent with the congressional act.

By supplemental brief filed on the part of appellant, two further propositions are advanced: (1) That the court erred in refusing to instruct the jury to the effect that the location of a mining claim must be upon the unappropriated public domain of the United States, and that, plaintiffs having failed to offer any evidence on that point, they are not entitled to a verdict. (2) The court erred in refusing to instruct the jury that if it appeared from the evidence that defendant and his grantors were in the actual possession of the mill site at the time of the location of the Zara lode, claiming to own the same, and operating the mill by using water from the creek through a ditch across the mill site, such use and occupation would give defendant the better right to the premises in dispute.

All the acts necessary to constitute a valid location of the lode claim were put in issue by the answer. The court instructed the jury, in substance, that a location of a mining claim must be made upon unoccupied public domain; but, as there was no testimony offered on the part of plaintiffs to

prove that their location was upon unappropriated mineral lands, the court should have given the instruction requested by defendant, and advised the jury that, in the absence of evidence on this point, the plaintiff could not recover.

The next proposition is based upon the theory that as defendant had established a vested right to the use of water flowing in the creek upon which his mill site is situate, and across which a ditch is constructed for the purpose of utilizing such water, he was entitled to hold the ground in controversy, for the reason that the grant of the water carried with it all incidentals necessary to its complete enjoyment, and therefore the land upon which the mill was situate; it being the means through which such water is beneficially used.

In support of this proposition, sections 2339, 2340, Rev. St. U. S., are relied upon, which provide, in substance, that whenever rights to the use of water for mining purposes have vested, and are recognized by the local customs, laws, and decisions of the courts, the owners of such rights shall be protected in the same, and the right of way for the construction of ditches for the purpose of utilizing such water is confirmed. All patents shall be subject to vested water rights or ditches used in connection therewith.

The theory of counsel for defendant is that privileges and appurtenances properly belonging to the thing granted pass with it, and, therefore, the right to the use of water being established, sufficient land passed with that right upon which to beneficially apply the water so appropriated. It is true that the grant of a particular piece of property, in the absence of any limitation, carries with it those appurtenances necessary to the beneficial enjoyment of the property granted, which it is within the power of the grantor to convey. An appurtenance is that which belongs to something else as an adjunct or appendage of such moment that the thing to which it attaches cannot be enjoyed without its use. It is therefore limited to that which is necessary to the enjoyment of

the principal thing granted. *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302. The appurtenance which could pass by virtue of the grant to a right to the use of water would be that necessary to its utilization, so that it could be applied to the purpose for which it was appropriated. The right might become appurtenant to that in connection with which it was beneficially used, but the latter could not be appurtenant to such right. It might as well be argued that, because a vested right to the use of water had been acquired for irrigation purposes, there attached to such right, as an appurtenance, land upon which to apply the water, as to say, as in this instance, there passed with the water right land in connection with which such water was utilized. The appurtenance attached to the water right of defendant is the right of way for the ditch through which the water is diverted. That is not in controversy. The laws of the United States protect this right. If plaintiffs should obtain a patent to the lode claim, it would be subject to such right.

The judgment of the district court is reversed, and the cause remanded for a new trial in harmony with the views herein expressed.

Reversed and remanded.

COPPER GLOBE MINING CO. v. T. M. ALLMAN ET AL.

(23 Utah 410; 64 Pac. 1019. Supreme Court. April 17, 1901.)

¹**Compliance with State Law must be proved.** Where defendants were in actual possession of mining ground at and before the institution of suit, under a location the validity of which was attacked by the plaintiff only on the ground of a previous location, the burden was upon plaintiff to show that such previous location was made and perfected in compliance not only with the laws of the United States, but also with such provisions of the statutes of the state relating to the location of mining claims as are not inconsistent with the United States statutes.

The place where the notice of location of a mining claim is posted is the initial point on the lode of the United States survey of the claim, and from which the boundaries of the claim can only be determined when it is 600 feet in width.

Discovery and notice essential. Under section 1496, Rev. St. 1898, to make a valid location of a mining claim the locator must first discover a lode or deposit of mineral in place, and then erect thereon, or in such close proximity thereto as to indicate the point selected as the place of discovery, a monument, and post thereon a notice of location, which must substantially comply with the requirements of section 1496.

²**Must mark bounds and record within 30 days.** To perfect a mining location, the locator must within 30 days, and in the manner prescribed by section 1497, Rev. St. 1898, mark the boundaries of his claim substantially as indicated by the discovery monument and notice of location; and within the same time as required by section 1498, Id., he must file for record with the county recorder of the county wherein the claim is located a substantial copy of the notice of location.

¹*Deeney v. Mineral Creek Co.* — N. Mex. —; 22 M. R. —.

Strict technical compliance with statute not insisted on. General description sustained. *Wells v. Davis*, 21 M. R. 1; *McCann v. McMillan*, 21 M. R. 6.

²A lode was discovered and marked and notice posted; 11 days afterwards second prospector located and set up boundaries. He saw the first notice 150 feet away but did not read it. Within 20 days first discoverer, who had been sick set up the boundaries. *Held*, that the first location was completed within a reasonable time. *Doe v. Waterloo Co.* 55 Fed. 12. Affirmed, 18 M. R. 265.

The right of a state to pass acts supplementing the mining act of congress in respect to the location of mining claims is recognized by section 2324, Rev. St. U. S.

Actual discovery. There must be something beyond a mere guess on the part of the miner, to authorize him to make a location which will exclude others from the ground,—such as the discovery of the presence of the precious metals at the place where the notice of location is posted, or in such proximity to it as to justify a reasonable belief in the existence of a lode there.

¹First complete location takes title. A mining location is not perfected until all of the essential statutory requirements are performed. A locator of a mining claim only acquires exclusive right to the possession of the claim when all of the necessary requirements of a location are observed; and, if he neglects to perform any necessary requirement within the time prescribed by statute, his attempted location is of no avail as against an intervening location peaceably and regularly made and covering the same ground, although he shall have performed the neglected requirements after the inception of the second location.

Plaintiff's location not valid. Where it is clear from the evidence that no valid location of plaintiff's claim was made on the ground as found by the trial court, the decree in favor of the plaintiff must be reversed, and a decree for the defendant ordered.

(Syllabus by the Court.)

Appeal from District Court, Seventh District.

JACOB JOHNSON, Judge.

Action by the Copper Globe Mining Company against T. M. Allman and others. Judgment for plaintiff. Defendants appeal. Reversed.

E. A. WEDGWOOD and M. M. WARNER, for appellants.

Reasonable time to complete location; first record does not cut out first discovery if made within first discoverer's time. *Bramlett v. Flick*, 20 M. R. 103.

After posting notice discoverer has a reasonable time to stake his claim. *Union Co. v. Leitch*, 24 Wash. 585; 64 Pac. 829.

²Compare *Kloppenstine v. Hays*. 20 Utah 45; 57 Pac. 712.

CHARLES DE MOISY, for respondent.

BASKIN, J. The complaint alleges that the plaintiff is the owner (subject to the paramount title of the United States) and in possession, and entitled to the possession, of the Copper Globe and the Copper Globe No. 1, No. 2, No. 3, and No. 4 mining claims, situate in Emery county, Utah; that the defendants, who are the appellants, claim an interest in said mining claims adverse to the plaintiff, but that such claim is without right. The relief prayed for is that the defendants be required to set forth the nature of their claim, and that it be adjudged that the defendants have no interest in the said mining claims of the plaintiff, and that they be forever enjoined from asserting any right thereto. The answer, after denying all of the allegations of the complaint not specifically admitted, alleges that the defendants are the owners (subject to the paramount title of the United States), in possession, and entitled to the possession, of the Norma No. 2 mining claim, which is identical with the Copper Globe No. 4 mining claim, as the same is described in the complaint; that the acts of the defendants in developing their said mining claim, and no other, constitute the grievances of which the plaintiff complains; that the mining claim known as the "Copper Globe No. 4" is fictitious and has no existence whatever, and the plaintiff's claim thereto is a cloud upon the said Norma No. 2 mining claim. Defendants pray that their title to said mining claim, Norma No. 2, may be confirmed and quieted, and that plaintiff be enjoined from asserting any claim thereto.

The trial court found:

That on the 6th day of February, 1899, the grantors of the plaintiff located the five mining claims described in the complaint, "by the erection of a monument of stone at the place of discovery, conforming to law, and posted in and upon such monument, on each side of said claims, their notice of location, containing the name of

the lode and claim, the names of the locators, the date of location, the number of lineal feet claimed in length along the course of the vein each way from the discovery monument, with the width on each side of the center of the vein, and a description of the claim located, by reference to natural objects and permanent monuments, in such manner as to identify the same. * * * That on the 21st day of March the grantors of the plaintiff marked the boundaries of each of said lodes or claims by establishing in each corner thereof, and in the center line of each claim, a monument as required by law, and marked upon each of such monuments the name of the claim, and corner, angle, and place that it represented. * * * That the plaintiff is now the owner of the above-described mineral lands, subject only to the paramount title of the United States therein, and the plaintiff is entitled to the exclusive possession of all of the above-described territory. * * * That, at the time said defendants and their grantors entered upon said ground and attempted to locate it as Norma No. 2, it was not public mineral land open to exploration and location, but at said time plaintiff's grantors held and owned the same under a valid location as Copper Globe No. 4; and the attempted location of the Norma No. 2 by the defendants and their grantors was of no effect whatever, as far as it included any of the ground within the boundaries of Copper Globe No. 4, as above described. * * * That defendants claim title in and to said Copper Globe No. 4 adverse to plaintiff, but said claim is without foundation or right; and the plaintiff is the owner and entitled to the exclusive possession of all of the above-described mining claims and lodes, known as the 'Copper Globe,' the 'Copper Globe No. 1,' the 'Copper Globe No. 2,' the 'Copper Globe No. 3,' the 'Copper Globe No. 4,' as above described."

Each of these findings of fact is assigned as error by the appellants, and the substance of the objections thereto is that neither of them is justified by the evidence.

It appears from the answer (and the court so found) that the defendants make no claim to any of the mining property described in the complaint, except the Copper Globe No. 4. The defendant's claim to that property is based on a location alleged to have been made on February 15, 1899, of the Norma No. 2. The plaintiff's claim to the Copper Globe No. 4 is based upon a location of the same alleged to have been made February 6, 1899, the notice of the location of which, as recorded in the records of Emery county on the 9th

day of February, 1899, is as follows: "Notice of Location. Notice is hereby given that the undersigned, having complied with the requirements of section 2324 of the Revised Statutes of the United States, and the local laws, customs, and regulations of this district, have located fifteen hundred feet in length by six hundred feet in width on this, the Copper Globe lode, vein, or deposit, bearing gold, silver, and other precious metals, situated in No District mining district, Emery county, Utah; the location being described and marked on the ground as follows, towit: Beginning at a stone monument about four feet high, where this notice is posted; thence south 300 feet to post No. 1; thence west 300 feet to post No. 2; thence north 1,500 feet to post No. 3; thence east 600 feet to post No. 4; thence south 1,500 feet to post No. 5; thence west 300 feet to post No. 1; thence north 300 feet to place of beginning. The above-described monument and claim is situated about two miles south of the crossing of Devil Cañon, and about 25 miles southeast of Ferron. The mining claim above described shall be known as the 'Copper Globe No. 4.' Located this sixth day of February, 1899. Names of locators: John H. Barton; A. A. Noon; T. M. Allman; St. V. Le Sieur; William A. Phillips,"—and upon a regular chain of conveyances from the original locators to it. The plaintiff does not claim that either it or its grantors have done any work on the Copper Globe No. 4 since its location, or that anything has been done respecting the same, except that on the day of its alleged location a stone monument about four feet high was erected within its boundaries, and a notice of location placed thereon, and that afterwards, on the 21st day of March, 1899, the same was staked. It does not appear that the plaintiff has ever been in the actual possession of said mining claim. The defendants, after locating the Norma No. 2, did considerable development work on the same, but at points many feet distant from the stone monument claimed to have been so erected on the Copper Globe

No. 4, and were so engaged at the time of the institution of this action.

As the defendants were in actual possession at and before the institution of this suit under a location the validity of which, as appears from the record, was attacked by the plaintiff only on the ground of the previous location of the Copper Globe No. 4, the burden was upon the plaintiff to show that the previous location was made and perfected in compliance not only with the laws of the United States, but also with such provisions of the statutes of the state relating to the location of mining claims as are not inconsistent with the United States statutes. *Wilson v. Mining Co.*, 19 Utah, 66-74, 56 Pac. 300; *Van Zandt v. Mining Co.*, 2 McCrary 159, 8 Fed. 725; *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413; *Sweet v. Webber*, 7 Colo. 443-450, 4 Pac. 752; *Hopkins v. Noyes* (Mont.) 2 Pac. 281; *McCowan v. Maclay*, 16 Mont. 234, 40 Pac. 602; *Barringer, Mines*, p. 216; *Lindl. Mines*, § 329. The right of the state to pass acts supplementing the mining act of congress in respect to the location of mining claims is recognized in the following language of section 2324 of the Revised Statutes of the United States, to wit: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory where the district is situated, governing the location, manner of recording, * * * of a mining claim," subject to the requirements imposed by congress. This right was also recognized by the supreme court of the United States in the case of *Erhardt v. Boaro*, 113 U. S. 528. Section 1496 of the Revised Statutes of Utah provides that: "The locator, at the time of making the discovery of such vein or lode, must erect a monument at the place of discovery, and must post thereon his notice of location, which notice shall contain: (1) The name of the lode or claim. (2) The name of the locator or locators. (3) The date of the location. (4) If

a lode claim, the number of linear feet claimed in length along the course of the vein each way from the point of the discovery, with the width on each side of the center of the vein, and the general course of the vein or lode, as near as may be, and such a description of the claim, located by reference to some natural object or permanent monument, as will identify the claim." Section 1497 requires the locator, within 30 days from the date of the discovery, to mark the boundaries of his claim; and section 1498 requires a substantial copy of the notice of location to be filed for record with the county recorder within 30 days from the date of posting the same upon the claim. The place where the notice of location is posted is the initial point on the lode of the United States survey of the claim, and from which the boundaries of the claim can only be determined when it is 600 feet in width. To comply with the provisions of the Revised Statutes of this state, and make a valid location of a mining claim, the locator must first discover a lode or deposit of mineral in place, and then erect thereon, or in such close proximity thereto as to indicate the point selected as the place of discovery, a monument, and post thereon a notice of location, which must substantially comply with the requirements of said section 1496. When this is done, it fixes the discovery or initial point of the claim. To perfect his claim, he must also, within the time and manner prescribed, mark the boundaries of his claim, and file a copy of the notice of location for record. The boundaries so marked should conform substantially to the location indicated by the discovery monument and the notice of location.

It appears from the testimony of St. V. Le Sieur, the only witness in the case who testified, that the Copper Globe No. 4 was located at the place and within the boundaries of the same set out in the complaint; that on the 21st day of March the original monument upon which the notice of location was posted on the 6th day of February was moved by him about

70 feet, and the notice after the removal was posted upon it. The evidence fails to show that any ore or vein matter has ever been discovered at the place where the first monument was placed, or at the place to which it was removed, or in close proximity to either place. On this subject St. V. Le Sieur testified as follows: "Q. Have you done any work on the Copper Globe No. 4? A. Not a bit. Q. How do you say that vein pitches from the Copper Globe? A. Between fifteen and twenty degress west. Q. Does it run under the mountain? A. Yes. Q. Isn't there any portion of it on top of the ground on the Copper Globe No. 4? A. There was some mineral on the ground on Norma No. 4, right about there. Q. Where would that be? A. It would be a question whether it would be on No. 4. I considered it on No. 4. Q. Where would that be with reference to your location monument? A. That would be south and east. Q. East three hundred feet, and south how far? A. About a hundred feet south. Q. You say you are not certain whether that was on the Copper Globe No. 4 or not? A. I thought it was. I could not tell, it is so rough there. Q. Is there any mineral there in sight? A. Only a little in the mountain. Q. What mountain? A. Copper Globe mountain; and this one, too; this little hill here. Little streaks of copper there. You can see some small streaks. Q. Did you discover any in place there? A. Yes; those streaks are in place." In other portions of his testimony he stated that at the time he made the location he saw copper on the claim in place, but fails to state that it was at or near the places where he erected the monuments before mentioned.

In the case of *Cheesman v. Shreeve* (C. C.) 40 Fed. 787, Phillips, J., charged the jury "that there should be a discovery of ore, gold or silver bearing mineral in rock in place, showing a well-defined crevice,—a discovery at least ten feet deep from the lowest rim rock thereof,—which discovery of mineral must be at the point claimed and designated, or made

the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the making of said location. Second. The erection of a location stake at the discovery of said claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the discovery." *Van Zandt v. Mining Co.*, 2 McCrary, 159, 8 Fed. 725; *Phillpotts v. Blasdel*, 8 Nev. 61. In *Erhardt v. Boaro*, 113 U. S. 527-536, 5 Sup. Ct. 560, 564, 28 L. Ed. 1113, 1116, the court said: "A mere posting of a notice on a ridge of rocks cropping out of the earth or on other ground that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner, to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence." *Doe v. Mining Co.*, 70 Fed. 445-461. A mining location is not perfected until all of the essential statutory requirements are performed. A locator of a mining claim only acquires exclusive right to the possession of the claim when all the necessary requirements of a valid location are observed; and, if he neglects to perform any necessary requirement within the time prescribed by statute, his attempted location is of no avail as against an intervening location peaceably and regularly made and covering the same ground, although he shall have performed the neglected requirements after the inception of the second location. *Wilson v. Mining Co.*, 19 Utah, 66-74, 56 Pac. 300; 1 Lindl. Mines, § 330, and cases cited. The boundaries of the Copper Globe No. 4 were not marked within the time prescribed by section 1497, Rev. St. Utah. It was not staked out until 13

days after the prescribed time had expired, and until after the rights of the defendants under their location had intervened. The description of the claim in the notice of location is as follows: "Beginning at a stone monument about four feet high, where this notice is posted; thence south 300 feet to post No. 1; thence west 300 feet to post No. 2; thence north 1,500 feet to post No. 3; thence east 600 feet to post No. 4; thence south 1,500 feet to post No. 5; thence west 300 feet to post No. 1; thence north 300 feet to place of beginning." The evidence shows that the boundaries of the Copper Globe No. 4, as they are now claimed by plaintiff, and as it was staked on the 21st day of March, materially differ from the boundaries in the notice of location, in this: the alleged discovery monument, instead of being 300 feet north from post No. 1, in the center of the south end line, is 1,006 feet north of the same. So that the claim as stated covers a space of ground 706 feet in length, and of the width of the claim, which is not covered by the notice of location; and the discovery monument, as it now stands, instead of being in the center of the claim, is about 200 feet from the west side line, so that there is embraced more than 300 feet of surface east of said monument. The northeast and southeast corners of Copper Globe No. 4 are situated at the same places as the northwest and southwest corners of the said Copper Globe claim. Therefore the former, as claimed by the plaintiff, lies lengthwise, immediately west of and adjoining the latter claim. If the Copper Globe No. 4 claim had been staked in accordance with the calls of the notice of the alleged location thereof, instead of being contiguous to the Copper Globe mining claim it would have extended 706 feet beyond the northwest corner of the Copper Globe. The defendants claim that the Copper Globe No. 4, instead of being located on the west side of the Copper Globe, was located on the east side of the same. All of the mining claims mentioned in the complaint, according to the respec-

tive notices of the locations of the same, were located on the same day (February 6th) by the same locators. The only one of plaintiff's witnesses who testified that the Copper Globe No. 4 was located west of the Copper Globe claim was St. V. Le Sieur. He stated that he first went upon the ground on the 6th day of February, 1899; that he reached the camp there just before dark, and while it was still light, and left there about noon on the 7th. He further testified as follows: "Plaintiff's Exhibit 5, purporting to be a location of Copper Globe No. 4, is T. M. Allman's writing. I have seen the original on the monument on Copper Globe No. 4. These monuments were constructed February 6th,—the one on No. 4, on the 7th, but the notice of the location was put up on the 6th. It was moved on the morning of the 7th to the monument. All of these locations were made on the night of the 6th. They had them all made except No. 4 when I got there. I did not put up notices for any of these claims. No. 4 was the only one I saw located. When we put up stakes on No. 4, on March 21st, I saw no other stakes on the ground. I saw a monument on the ground that had a notice on it,—Norma No. 2. I found the Copper Globe No. 4 notice on that day twelve hundred feet south of the discovery monument of No. 4. I carried it up and put it up on the discovery monument. I built a new monument. I did that because the original monument was not in the right place." The abstract contains no other evidence, except the above, in relation to either the time, manner, or place of making the location of the Copper Globe No. 4, as the same is claimed in the complaint, and is, in substance, all of plaintiff's testimony touching the same. Barton and Allman, two of the locators, were the active parties in locating the mining claims mentioned in the complaint, and they each testified that the Copper Globe No. 4 was located east of the Copper Globe claim. Barton, among other details of making the location, testified: "Allman and I crossed the wash and came

down to the south line of the Copper Globe claim, and came across here to No. 4, straight east from the lower part of the Copper Globe claim, and located a claim called 'Copper Globe No. 4.' It was on the east side of the east side line of the Copper Globe and the old Dead Dane claim. I put up the monument myself, and while I was building the monument Allman wrote out the notice. After we put up the notice on the Copper Globe No. 4, I walked east three hundred feet and set up a side monument. It is there today. I helped put up one stake at the northeast corner of Copper Globe. There is an old dead tree fallen over by the wash, and we broke off a limb and made a stake. We put up a stake in the corner of the tree, and put a few rocks around it. It is the northeast corner of Copper Globe as it was then, and the northwest corner of Copper Globe No. 4." Allman's testimony fully corroborates Barton's statements. The testimony of Phillips, another of the locators, sustains the contention of the defendants. Chris. Jensen testified: "I was at what is termed the 'Copper Globe Mountain' about the 6th day of February, and stayed around that locality two or three days. During that time I was on the ground west of the south point of the mountain. I know the Norma No. 2 ground. I was over it during those two or three days. I saw no discovery monument or stakes of any kind. I have been there since that time. I have seen the monument of Norma No. 2, and what has been termed here 'Copper Globe No. 4.' Those monuments, or either of them, were not there those two or three days I was there. I would say there was no monument on the ground when I went over it, where there is now. I have seen monuments now where I know there were no monuments then. There were no discovery monuments on Norma No. 2." He further testified that while he was there he met St. V. Le Sieur, Barton, Allman, and Phillips. John H. Childs testified that: "On the sixth day of February I met Le Sieur at the Copper Globe group. When we

got there, Le Sieur, Allman, Phillips, and Barton were on the ground. I stayed around that neighborhood two or three days. We were around the whole of the ground now marked 'Norma No. 2,' lying west of the southern portion of Copper Globe mountain. There were no monuments or stakes on what is now marked as 'Norma No. 2 Property,' west of the mountain. There is a flat there. If there was anything on it you could see it plain." The preponderance of the evidence is clearly in favor of defendants' contention. The trial court granted the decree prayed for in the complaint. It is clear from the evidence that no valid location of the Copper Globe No. 4 was made on the ground claimed by plaintiff, and it is also clear that the findings and decree are erroneous.

It is ordered that the decree be reversed and the cause remanded, with directions to enter a decree in favor of the defendants as prayed for in the answer, and that the respondent pay the costs.

MINER, C. J., and BARTCH, J., concur.

JOHN REGAN v. THOMAS WHITTAKER ET AL.

(14 South Dakota 373; 85 N. W. 863. Supreme Court. April 19, 1901.)

Appellate practice. Under Comp. Laws, § 5090, subd. 4, providing that a motion for a new trial on the minutes of the court shall be denied if the notice does not specify wherein the evidence was insufficient to support the finding, the supreme court, in reviewing an order overruling a motion for a new trial on the minutes, will not review the evidence as to its sufficiency, where the notice of motion did not specify the particulars in which the evidence was insufficient.

Hearsay evidence. In an action to restrain an alleged trespass to a mining claim, evidence of the plaintiff that a third party told him he could locate the mine in his own name was properly excluded as incompetent.

Assessment work no proof of location. In an action to restrain a trespass to a mining claim, where the defendant alleged that the plaintiff had never made a valid location of the claim, evidence that plaintiff had performed assessment work on the claim was properly excluded as immaterial.

Where evidence was improperly excluded when offered, the error was cured by its subsequent admission.

No valid lode to attack town site. In an action to restrain a trespass to a mining claim, a judgment for the defendant was properly rendered, where the court found that no valid discovery had been made on the lode, that the same had not been located or the boundaries marked in the prescribed manner, that no valuable mineral of the required classes was within the boundaries of the property, and that the defendant's title to the property was valid.

¹*Bonner v. Metkle*, 19 M. R. 83.

A mining claim which has no discovery is void and a deed for it passes no title. *Buck v. Jones*, 18 Colo. App. 250; 22 M. R. —.

Where annual labor is neglected on claims covered by townsite patent, the title to the same is lost. *Callahan v. James*, (Cal.) 71 Pac. 104.

A townsite patent under R. S. § 2392 issued in 1877 did not convey title to any valid mining claim. The distinction that it must be a mine of value does not apply to patents under that act. *Callahan v. James*, 141 Cal. 291; 74 Pac. 853.

Appeal from Circuit Court, Lawrence County; JOSEPH B. MOORE, Judge.

Action by John Regan against Thomas Whittaker and others. From a judgment in favor of the defendants, the plaintiff appeals. Affirmed.

JAMES A. GEORGE (CHAS. E. DAVIS, of counsel), for appellant.

MOODY, KELLER & MOODY, for respondents.

CORSON, J. The plaintiff, claiming to be the owner of a mining lode location designated as the "Phoenix Lode," located within the boundaries of the city of Deadwood, brought this action to restrain the defendant from interfering with, or trespassing upon, the same, and for damages in the sum of \$5,000, sustained in consequence of trespasses upon the same by the said city of Deadwood, and for such other and further relief as might be just in the premises. The defendant Whittaker answered for himself and the other defendants, denying, in effect, plaintiff's title, and claiming the premises under and by virtue of a conveyance made to him by the probate judge of Lawrence county under the townsite entry of the city of Deadwood. The case was tried to the court without a jury, and findings and judgment were rendered in favor of the defendants, and the plaintiff appeals.

The plaintiff bases his claim for a reversal mainly upon the ground that the findings of the court were not supported by the evidence and were contrary to the same. Respondent makes the preliminary objection that this court cannot review the evidence for the reason that the motion for a new trial was made upon the minutes of the court, and that the notice of intention to move for a new trial contained no specification of the particulars in which the evidence is

alleged to be insufficient, and that it was therefore the duty of the court below to deny the motion, and that this court, without such a specification of the particulars in which the evidence is claimed to be insufficient as provided by subdivision 4, § 5090, Comp. Laws, cannot review the evidence. The material parts of the notice of intention to move for a new trial are as follows: " You will please take notice that the above-named plaintiff intends to move the above-entitled court for an order setting aside the decision and judgment of the court heretofore entered in this action, upon the grounds following: (1) Of newly-discovered evidence material to the plaintiff, which he could not with reasonable diligence have discovered and used at this trial. (2) Insufficiency of evidence to justify the decision of the court. (3) For the judgment and decision of the court is against the law, in this: (a) That the court should have found for the plaintiff under the law and the testimony submitted to the court, instead of against the plaintiff and in favor of the defendant. (b) The court should have adopted the findings of fact and conclusions of law prepared on the part of the plaintiff." It will be observed from this notice that it fails to specify the particulars in which the evidence is alleged to be insufficient, and in such case it is provided, in the fourth subdivision of the section above referred to, that, "if the notice do not contain the specifications herein indicated, when the motion is made on the minutes of the court, the motion must be denied." There also appears in the abstract what is termed a "notice of motion for a new trial," but that also fails to state the particulars in which the evidence is alleged to be insufficient. This court has repeatedly held that when the motion for a new trial is made upon the minutes of the court or on a bill of exceptions, and the notice of intention or the bill of exceptions fails to specify the particulars in which the evidence is alleged to be insufficient, it is the duty of the trial court to deny the motion, and in such

case this court will decline to review the evidence. *Henry v. Dean*, 6 Dak. 78, 50 N. W. 487; *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687; *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439; *Tootle v. Petrie*, 8 S. D. 19, 65 N. W. 43; *Land-Mortgage Co. v. Case*, 13 S. D. 28, 82 N. W. 90. The question, therefore, as to the sufficiency of the evidence to sustain the findings, will not be considered by this court.

The only questions, therefore, presented, are whether there were any errors of law occurring at the trial in the exclusion or admission of evidence, and whether or not the findings support the judgment. Only three errors in the exclusion of evidence offered by the appellant have been called to our attention. Regan, when upon the stand as a witness in his own behalf, was asked the following question: "You located in your own name,—changed the name of the mine?" to which he answered: "Mr. Gallagher told me I could locate it in my own name." On motion of counsel for the respondents, the answer was stricken out. We think the court ruled correctly, as his statement of what Gallagher told him was clearly incompetent. One Gallup, called as a witness on the part of the appellant, was asked the following question: "I will ask you if you have ever seen Mr. Regan, the plaintiff in this action, performing any work—assessment work—upon the mining claim known as the 'Phoenix Lode'." This was objected to as immaterial, and the objection sustained. The theory of the respondents was, and that was also the view taken by the trial court, that appellant had never made any valid location of the Phoenix lode, and, that being true, any assessment work that he might have done upon the claim was immaterial; hence, in that view, the ruling of the court was correct. Counsel for the appellant offered in evidence a location certificate, recorded in Book 9, at page 579. This was objected to as incompetent, and the objection sustained. We think that we may assume that this certificate was subsequently admitted in evidence, as the court in its findings

sets out a certificate in full which was recorded in the book and at the page referred to in the offer. If there was any error in excluding the certificate at that time, it was cured by its subsequent admission in evidence.

The court in its findings of fact set out at some length various proceedings of the appellant in his attempt to locate the mining claim in controversy, but finds that the appellant had no valid mining location. The plaintiff claimed title under a location claimed to have been made by his predecessors in interest, Patrick A. Gallagher and Jacob Runyon, in May, 1877, and a subsequent purchase of the property in June, 1883, and also under a relocation of the same claimed to have been made by him under the name of the "Phoenix Lode," in June, 1883, and subsequently amended locations. As regards these locations the court finds: "(1) That at some time in the year 1877, Patrick Gallagher and Jacob Runyon, each a citizen of the United States, and residents of the county of Lawrence, in the then territory of Dakota, attempted to make a mining location, calling the same the 'Gallagher Lode.' That the same was staked either in the fall of 1877 or in the spring of 1878, but there is no evidence that the stakes were marked as required by law. A notice of location was posted at the point claimed as the point of discovery, and a certificate of location was thereafter filed with the register of deeds of the said county of Lawrence, then territory of Dakota, but the evidence fails to show that such location certificate complied with the requirements of the law. No discovery of a vein or lode of quartz or other rock in place, containing valuable mineral, was made on said attempted location. (2) That on the 29th day of July, 1878, there was not on said alleged Gallagher lode any discovery of a vein or lode of quartz or other rock in place containing valuable mineral, nor was said alleged Gallagher lode location at that time a valid existing mine location, nor was there on said day any known valuable vein, lode, or mine of gold,

silver, cinnabar, or copper within the limits thereof. (3) That on or about the 4th day of June, 1883, Patrick A. Gallagher transferred to the plaintiff, John Regan, such interest as he had in said alleged Gallagher lode location; that there was no written instrument of any kind or character executed by said Gallagher to the plaintiff evidencing the transfer of such interest, but that said transfer was merely verbal, and a transfer of the possession. (4) That on the 4th day of June, 1883, the plaintiff, John Regan, went upon the said alleged Gallagher lode location, and attempted to locate thereon a mining location, calling the same the 'Phoenix Lode'; that at that time the plaintiff made no discovery of a lode or vein of quartz or other rock in place containing valuable mineral; that at the point at which he claimed his discovery there was then existing a shaft some ten or fourteen feet in depth, which plaintiff at that time cleaned out, but did not work therein or thereon, and made no discovery of a valuable mineral bearing lode or vein of quartz or other rock in place. * * * (10) That on the 29th day of July, 1878, at the time of the entry of said town site by the probate judge of said Lawrence county as aforesaid, and on the 26th day of June, 1882, at the time the property described in the preceding finding of facts was conveyed by the probate judge of Lawrence county to the defendant, Thomas Whittaker, there was within the boundaries of said property no valuable mineral vein or mine of gold, silver, cinnabar, or copper, or any valid mining claim or possession held under existing laws." It will thus be seen that under the findings the plaintiff had no valid location of a vein or lode of mineral bearing ores. Without a valid discovery and a valid location, either by himself or his predecessors in interest,—assuming, without deciding, that plaintiff succeeded to such interest,—the plaintiff was not entitled to recover in this action, as against one claiming title under a properly located town site, as the findings of fact do not bring plaintiff's claim within

any of the reservations contained in the Deadwood town-site patent, those reservations being as follows: "Provided no title shall be hereby acquired to any mine of gold, silver, cinabar or copper; or to any valid mining claim or possession held under existing laws. And provided further that the grant hereby made is held and declared to be subject to all the conditions, limitations and restrictions contained in section two thousand three hundred and eighty-six (2386) of the Revised Statutes of the United States, so far as the same are applicable thereto." The section of the United States statute referred to reads as follows: "Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States." The court further finds that on the 29th day of July, 1878, the probate judge of Lawrence county entered at the United States land office of Deadwood, and made payment therefor, what is known as the "Town Site of Deadwood," in trust for the use and benefit of the inhabitants of said city, under the laws of the United States; that said entry included, among other lands, the premises in controversy in this action; that subsequently to the 26th day of June, 1882, the probate judge of Lawrence county, as such, conveyed by deed to the defendant Thomas Whittaker a portion of the land embraced within the town site, which said land is fully described in the finding; that the alleged Gallagher and Phoenix lodes claimed by the plaintiff were located upon and over the said premises so conveyed to said Whittaker, and conflicted therewith to the extent of about $2\frac{1}{2}$ acres.

Under the findings of the court, therefore, that no valid discovery was made upon the so-called "Gallagher Lode" or

the so-called "Phoenix Lode," and that the same were not located or their boundaries marked in the manner prescribed by law, and that there was not within the boundaries of said property any valuable mineral vein or lode of gold, silver, cinnabar, or copper, the said defendant Whittaker was entitled to the possession of the ground under his town-site deed, so in conflict with the Gallagher and Phoenix locations, as against the said plaintiff; and the court, therefore, properly concluded as matter of law "that the defendant Thomas Whittaker is the owner in fee of the lands and premises in the said deed of the said probate judge of Lawrence county to him, * * * and that the plaintiff, John Regan, has no right, title, or estate therein, or any part or parcel thereof, and that the defendant Thomas Whittaker is entitled to have his title thereto quieted as against the said plaintiff, John Regan." What would have been the rights of the parties had the plaintiff or his predecessors in interest made a valid discovery, and located the claim in the manner prescribed by law, it is not now necessary to decide, and we do not determine that question, and go no further than to hold that under the findings of fact disclosed by the record in this case the judgment below should be affirmed. The judgment of the circuit court is affirmed.

**¹BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.
v. EMPIRE STATE-IDAHO MINING & DEVELOPING CO.
ET AL.**

(109 Federal 538. Circuit Court of Appeals, Ninth Circuit. May 6, 1901.)

²Overlapping survey may hold the extralateral rights which its lines call for. The locator of a lode mining claim has the right to lay any of his lines within or across the surface of a valid prior location, in the absence of objection by its owner, for the purpose of securing to himself underground or extralateral rights not in conflict with any rights of the senior location; and where a junior claim overlaps, having one of its parallel end lines laid within or across a senior location, its owner acquires all the rights, both surface and extralateral, as against the government and subsequent locators, that he could have if the prior location had not been made; and he may follow the vein in its downward course between the planes of his own end lines in all respects as though there were no prior location, except where it would conflict with the rights of the owner of such senior claim.

³By failure to adverse or to successfully maintain its suit supporting its adverse claim, the priority of the earlier location so failing is lost and the later location becomes in fact by its entry and patent the prior title.

The same as to extralateral rights. The owner of a prior location which fails to maintain them by adverse loses the extralateral rights which it otherwise could have the right to claim, against a later location which has intervened with a patented title.

In Error to the Circuit Court of the United States for the District of Idaho.

For former opinion, see 108 Fed. 189.

¹For modification of opinion see *Empire State Co. v. Bunker Hill Co.* 114 Fed. 420; 22 M. R. —.

²*Empire State Co. v. Bunker Hill Co.* 131 Fed. 591.

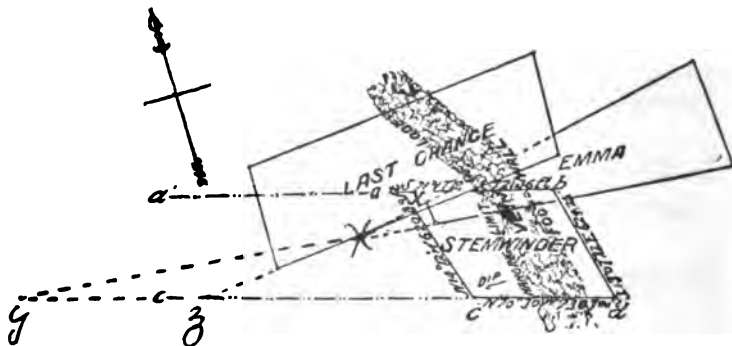
³*Nesbit v. Delamar's Co.* 19 M. R. 286; *Jefferson M. Co. v. Anchoria-Leland Co.* 32 Colo. 176; 75 Pac. 1070.

CURTIS H. LINDLEY and JOHN R. McBRIDE, for plaintiff
in error.

W. B. HEYBURN, E. M. HEYBURN, and L. A. DOHERTY,
for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This is an action of ejectment, in which the plaintiff in error was plaintiff in the court below. It involves an underground segment of a mineral-bearing ledge claimed by the plaintiff in the action to be a portion of the Stemwinder mining claim, which claim confessedly is, and was at the time of the alleged trespass upon it by the defendants, owned by the plaintiff. The case comes here on the judgment roll. Annexed to the findings of the court, and made a part of them, is a diagram showing the Stemwinder, Emma, and Last Chance mining claims, with the vein passing through each of them in a northwesterly and southeasterly direction, which diagram is here inserted, to illustrate the positions and claims of the respective parties:



The defendant Last Chance Mining Company is shown by the findings to be the owner of the Emma and Last Chance claims. Both of the latter were patented by the United

States more than five years prior to the commencement of this action. The Stenwinder has not been patented. Each of the claims was located in the year 1885. When the claimant of the Emma applied to the government for a patent therefor, the claimant of the Stenwinder filed in the land office an adverse claim to that portion of the ground in conflict between the two claims, and thereafter brought an action in the district court of the First judicial district of the then territory of Idaho to establish the alleged priority in location of the Stenwinder over the Emma, but which action resulted in a judgment establishing the priority of the Emma. In respect to the Stenwinder and Last Chance claims the court below found—

“That the Last Chance lode mining claim, as shown on said diagram A above [the diagram already set out], was located by its original claimants subsequent to the location of the Stenwinder, and although the worded notices of each dated on the same day of September, 1885, the Stenwinder discovery and location was made prior to the said Last Chance, and its rights attached first to the ground now in dispute between the parties; and I find that upon an application for patent to the Last Chance lode mining claim, as described in said diagram, no adverse claim was made by the said Stenwinder owners to the ground in conflict as shown on said diagram, and that the said Last Chance Mining Company received their patent therefor as so described, and is entitled to all the rights conferred by such patent.”

The eighth, ninth, tenth, eleventh, and twelfth findings of fact are as follows:

“Eighth. That there is a large ledge or lode of mineral-bearing rock and earth in place which enters the southerly end line of the Stenwinder lode claim, approximately having the course and width shown on the diagram A, and passing on its course through the said Stenwinder, the said Emma, and the said Last Chance lode claims, and having a dip southwesterly of from 35 to 40 degrees from the perpendicular; and, on its descent into the earth, developments show that it passes far beyond the surface of each of the said claims, and said vein or lode has its apex in each of said claims to the extent

indicated on said diagram. Ninth. That the lines which cross said lode on its course through the Emma claim are not parallel, and so converge in their prolongation to the westerly that planes drawn downward along the course of said lines intersect each other at a point marked 'X' on said diagram, and the rights of the owners of the said Emma lode claim to the lode cease at that point. Tenth. That the lines a, b, c, d, on said diagram, correctly show the lines on the surface, projected from the southeasterly and northeasterly corners of the Stemwinder lode claim, and indicate its right to follow the lode on its descent westerly, except as modified by the rights which defendants are adjudged to have by virtue of these findings. Eleventh. That the defendants have entered upon and withhold from the plaintiff all that portion of said lode which lies between a plane drawn downwards along the line marked 'a, b,' and the plane of the south end line of said Last Chance claim drawn perpendicularly downwards along and projected to the point Z on said diagram, and assert right and title to same. Twelfth. That the allegation in the answer of the defendant Last Chance Mining Company (subdivision 8), as set forth in answer to the first cause of action in plaintiff's complaint, and also in its answer to the second cause of action therein, that the plaintiff's action is barred by virtue of section 4036 of the statute of limitations is not sustained by the evidence."

The conclusions of law reached by the court below are as follows:

"The plaintiff's action is not barred by law. That the plaintiff is entitled to recover from the defendant that portion of the lode or vein sued for which lies in the triangular space bounded by perpendicular planes passing through lines described as follows: Commencing at a point where the south line of the Emma, prolonged westerly, intersects the south line of the Last Chance, and indicated on said plat A by the letter 'X'; thence westerly along the prolongation of said Emma line ——— feet, to the point where the same is intersected by the original south line of the Stemwinder prolonged westerly, and indicated upon said plat A by the letter 'Y'; thence easterly along said prolonged line of the Stemwinder ——— feet to the intersection of said south line of the Last Chance prolonged westerly, and indicated upon said plat by the letter 'Z'; and thence to the place of beginning ——— feet along said south line of the Last Chance and its prolongation,—the right of said plaintiff to said segment of said lode or vein being hereby denied to all other portions of said vein or lode sued for in this action by plaintiff, and not contained in above description."

Judgment was entered accordingly, from which the present appeal was taken. In its opinion the court announced its conclusion in these words:

"My conclusion is that the Stemwinder owns only so much of the apex of the ledge, measured along its center, as lies between its south line as originally located and the south line of the Emma, and that, in following the ledge on its downward course, it must be between the prolongation of the planes passing through these lines, which would end at their point of convergence indicated upon the plat by the letter 'Y.' There is another view which might be taken of the Stemwinder's right; that is, that its south boundary line should be considered established, and that another line parallel to it should be established at the point where its ledge passes into the Emma, as was done by the supreme court in the *Del Monte Case*, *supra*. *Del Monte M. & M. Co. v. Last Chance M. & M. Co.* 171 U. S. 55. This rule would be followed here, but for the priority of the Emma."

The priority of location of the Emma over the Stemwinder claim is not only found as a fact by the court below, but is conceded by the plaintiff in error; and the plaintiff further concedes, not only in its brief, but in its complaint, that the Emma has the right to follow the vein in its dip between vertical planes drawn through its converging end lines to the point of their intersection. The underground segment of the vein included within the triangle formed by the prolongation of those two vertical converging end lines and the westerly side line of the Emma, as well as the surface and everything under the surface of the Emma claim, is thereby eliminated from controversy. Notwithstanding the location and rights of the Emma, the Stemwinder claim was so located as to include within its lines a considerable portion of the Emma's surface. The lines of the Stemwinder that cross the vein are parallel, and are therefore, in law, the end lines of that claim, whether so intended by the locator at the time of its location or not. *Mining Co. v. Tarbet*, 98 U. S. 463; *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478; *King v. Mining Co.*, 152 U. S. 222. No doubt. the owner of the

Emma could have lawfully prevented any intrusion upon his claim, and have maintained the exclusive possession thereof. As said by the supreme court in *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S. 55, 83:

"A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, uninclosed, and not subject to any full actual occupation where the limits of possessory rights are vague and uncertain, and where the validity of apparent locations is unsettled and doubtful. Under those circumstances, it is not strange—on the contrary, it is something to be expected, and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why," asks the court, "should a subsequent location be held absolutely void for all purposes, and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must, when it appears that his lines are to any extent upon territory covered by a prior valid location, go through the form of making a relocation, simply works delay, and many prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines. In this connection," continued the court, "it may be properly inquired, what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township, and section system? Clearly not. While the contemplation of congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose, also, was to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered

vein; and it was expected that the locator would so place it as, in his judgment, would make the location lengthwise cover the course of vein. There is no command that the side lines should be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downward outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel, in order that going downward he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then, following their planes downward, his rights will be either converging and diminishing or diverging and increasing the further he descends into the earth. In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights."

The court accordingly answered in the affirmative this question propounded to it by the circuit court of appeals for the Eighth circuit:

"May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

In the case of the Hidee Gold-Mining Company, decided by the secretary of the interior January 30, 1901 (advance sheets), it was held that the location of a lode mining claim may even be laid within, upon, or across the surface of patented lode mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines are established openly and peaceably, and do not embrace any larger area of surface, claimed and unclaimed, than the law permits.

As, therefore, upon the facts appearing, there was no valid objection to the Stemwinder location, the next question is, what rights did the owner of that location thereby secure? Confessedly, he acquired nothing as against the Emma, either on the surface or underground. But how is it as against the government and every subsequent locator? In the absence of any objection on the part of the owner of the Emma, the locator of the Stemwinder had, as we have seen, the legal right to extend his lines upon and across that claim. The ground to the north and south of the Emma was, according to the findings, open and unappropriated public land, with a mineral-bearing ledge passing in a northwesterly and southeasterly direction through the Emma and into the adjoining unappropriated public land to the north and south of that claim. Across that ledge and on unappropriated public land the locator of the Stemwinder laid his southerly end line, and along the course of the ledge and on unappropriated public land he laid his westerly side line. Across the ledge, partly on unappropriated public land and partly on the prior Emma location, he laid his northerly end line, parallel with his southerly end line, and along the course of the ledge, partly on the Emma and partly on unappropriated public land, he laid his easterly side line, almost, if not quite, parallel with his westerly side line. As, in the absence of any objection on the part of the owner of the Emma, the locator of the Stemwinder had the legal right to cross the prior location, his lines, as against the government and all subsequent locators, would therefore seem to have been perfectly laid. Under such circumstances, we are unable to see why, as against the government and all subsequent locators, the location should not carry precisely the same rights, surface and extralateral, that it would carry if none of the lines had been laid upon or over a prior location, which, under the statute governing extralateral rights, would give to the locator of the Stemwinder, as against the govern-

ment and all subsequent locators, the right to follow the dip of the vein in its departure from the westerly side line of the claim indefinitely between vertical planes drawn through the parallel end lines extended indefinitely in their own direction. We think, too, that this is the logical deduction to be drawn from the reasoning upon which the judgment of the supreme court in the case of *Del Monte Co. v. Last Chance Co.*, *supra*, was based. In effect, the court below made the south line of the Emma the north end line of the Stemwinder, thereby destroying the parallelism of the end lines of the Stemwinder fixed by its locator, and either destroying all of its extralateral rights entirely, or limiting them to converging lines intersecting at the point Y on the diagram. This is in conflict with what was held by the supreme court in the *Del Monte Case* in respect to the line e, i, of the New York claim. That line, which was the northerly side line of the New York, stood in the same relative position to the Last Chance claim there involved as the south boundary of the Emma claim does to the Stemwinder; and the supreme court, in answer to the third question submitted to it by the circuit court of appeals for the Eighth circuit, held that the easterly side line of the New York did not constitute the end line of the Last Chance claim there in question. Locations of lode mining claims are made for the purpose of reaching the underground veins. "The area of surface," said the court in the *Del Monte Case*, "is not the matter of moment. The thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein as possible." 171 U. S. 75.

What has been said is based upon the findings of the court below (which, as the case is presented, must govern us) in respect to the location of the Stemwinder, and the priority in fact of that location over that of the Last Chance claim. The conclusion above indicated we think necessarily follows

from those facts, unless it be that the extralateral rights secured by the Stemwinder by virtue of its location were lost or impaired by reason of its failure to contest the application of the Last Chance for a patent to its claim, and the issuance of that instrument. That question remains to be considered. The findings are to the effect that an application for a patent to the Last Chance claim, as described in the diagram above inserted, was made, and that a patent was issued therefor. The Last Chance, as so applied for and patented, included, as will be seen from the diagram, a triangular piece of the ground embraced by the Stemwinder location, and included the westerly portion of the Stemwinder's northerly end line. Notwithstanding that fact, the findings declare that the Stemwinder failed to contest the application of the Last Chance for its patent. What is the consequence? By section 2325 of the Revised Statutes it is provided that a patent may be obtained for land located or claimed for valuable deposits. To accomplish this, a locator who has complied with all the statutory requirements on that subject may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of his claim, made by or under the direction of the surveyor general of the United States, showing accurately the boundaries of the claim, which must be distinctly marked by monuments on the ground. He must also post a copy of his plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to filing his application for a patent, and he must also file an affidavit of at least two persons that such notice has been duly posted. A copy of the notice must be filed in the land office. Upon the filing of such papers the register of the land office is required to publish a notice that the application has been made for the period of 60 days in some newspaper to be by him designated as published nearest to the claim, and he must also post a similar notice for the same time in his own office.

If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the 60 days of publication, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists; and thereafter no objections from third parties to the issue of the patent shall be heard, except to show that the applicant has failed to comply with the law. Where an adverse claim is filed within the time, all proceedings upon the application in the land office, except in reference to the publication of proof of notice, are to be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It is then made the duty of the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same to final judgment. After such judgment shall have been rendered, the party entitled to the possession of the claim may, without further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required, as in other cases. When this has been done, and the proper fees paid, the whole proceedings and the judgment roll must be certified to the commissioner of the general land office, and a patent shall issue for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess. If it appears from the decision that several parties are entitled to separate and distinct portions of the claim, each party may pay for his portion of the claim, together with proper fees, and file with the certificate a description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the commissioner as in the preceding case, and patents shall issue to the several parties according to their respective rights. Section 2326, Rev. St.

The claim that the applicant is by the foregoing provisions of the statute authorized to purchase and receive a patent for, upon full compliance with those provisions, is the claim that he was by preceding provisions of the same statute authorized to locate, namely, one upon unappropriated public land of the United States of the character described in the statute. The application for the patent, therefore, necessarily carried with it, if not an express, certainly an implied, allegation that the location upon which the application was based was made upon land open to location, and therefore was the prior location. The publication of the notice of the application required by the statute was a notice to all the world to present to the land office any and every adverse claim to that of the applicant. A failure to do so constituted, in law, an admission of the truth of every fact covered by the application; and the issuance of a patent in pursuance of such application is, in the absence of any adverse claim, quite as conclusive of the patentee's rights as if a contest in respect to the application had been initiated in the land office, and adjudicated by a competent court in favor of the applicant. In either case, it is absolutely conclusive against all adverse claimants. *Gwillim v. Donnellan*, 115 U. S. 45; *Mining Co. v. Rose*, 114 U. S. 576; *Hamilton v. Mining Co.*, 13 Sawy. 113, 33 Fed. 562; *Last Chance M. Co. v. Tyler M. Co.*, 157 U. S. 683. The last case cited involved a controversy between the owners of the Tyler claim and those of the Last Chance claim, both locations including a certain triangular strip of ground marked "A" on the diagram found on page 685, 157 U. S. The owners of the Tyler claim having applied for a patent for the entire claim, as indicated on that diagram, pursuant to the provisions of section 2324 of the Revised Statutes, the owners of the Last Chance, pursuant to the provisions of section 2325, filed an adverse claim to the conflicting triangle, and thereafter commenced suit in the district court of the First judicial district of the then terri-

tory of Idaho. In that action the owners of the Tyler claim appeared and filed an answer, which they withdrew before the case came on for trial; and a judgment was thereupon entered in favor of the owners of the Last Chance, the plaintiffs in the action. That withdrawal was based upon the fact that pending the proceedings in the court the owners of the Tyler claim amended their application for purchase in the land department by excluding therefrom the conflicting triangle. The amended application was accepted by the land office, and a final certificate for the tract, with the reduced boundaries, was issued to the owners of the Tyler claim. The ore bodies in dispute in the case were within the legal end lines of the Last Chance claim, and on the dip of the vein as it passes through it, and also on the dip of the vein within the vertical planes of the end lines of the Tyler extended in their own direction. The solution of the controversy, therefore, turned upon the question of priority between the two locations. When the case was before the supreme court the main question considered, and the question upon which the court disposed of the case, was whether or not the judgment of the district court of the territory of Idaho was admissible upon the question of priority of the two claims; and the court held that it was not only admissible upon that question, but was "binding by way of estoppel as to every fact necessarily determined by it, and that priority of location was one fact so determined." 157 U. S. 695. In that case, as has been said, the owners of the Last Chance claim initiated in the land office a contest against the application of the owners of the Tyler location, and thereafter brought its action in the district court of the territory of Idaho to determine the contest, pursuant to the provisions of the Revised Statutes; in its complaint alleging, among other things, that the Last Chance was the prior location. After answering the complaint, and before the trial of the issues, the owners of the Tyler claim withdrew their answer, and failed to ap-

pear at the trial. The court proceeded to hear evidence on the part of the plaintiffs (upon which it made certain findings of fact and conclusions of law, and entered judgment adjudging the Last Chance Mining Company to be the owner of the triangle in conflict between the two locations, "by virtue of a valid location of the said Last Chance mining claim made by John Flaherty, J. L. Smith, M. Carlin, and John M. Burke on the 17th day of September, 1885, and that the plaintiff is entitled to the possession of the said ground so in conflict as aforesaid by virtue of such valid location." It was there contended that the defendants to the suit did not in fact contest the suit, but withdrew their answer prior to trial, and that there was only a judgment by default; but the court very properly answered that a judgment by default was just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. "The essence of estoppel by judgment," said the court, "is that there has been a judicial determination of a fact and the question always is, has there been such determination? and not upon what evidence or by what means was it reached. A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission." These observations, it is true, were made in respect to a suit brought in pursuance of section 2325 of the Revised Statutes, pursuant to a contest actually initiated in the land office. But we think it quite clear that a determination of a fact by the judgment of a competent court in a suit brought pursuant to the provisions of the statute, followed by the issuance of a patent in favor of the prevailing party, is no more conclusive than is a patent issued in pursuance of section 2324 of the Revised Statutes for a claim against which no contest was filed. The statute, as has been said, makes any and every person claiming an adverse interest a party to the proceeding for a patent, and provides for ample notice.

The notice so provided for is the equivalent of a summons in a judicial proceeding, and he who fails to heed it has no right to complain that his rights are concluded by his default, and the issuance of the patent in pursuance of the application. The land department is, as said by the circuit court of appeals for the Eight circuit in *U. S. v. Northern Pac. R. Co.*, 95 Fed. 864, 869, "a quasi judicial tribunal, and a patent is the judgment of that tribunal upon the questions presented, and a conveyance in execution of the judgment." The application for the patent for the Last Chance was, as has been seen, for the whole claim, as indicated on the diagram hereinbefore set out, and carried with it, as has been said, the implied, if not the express, allegation that the location was made upon land at the time open to location, and was therefore prior to any location of any one else. The issuance by the government of its patent after due notice to all the world of the application, and ample notice to every one to contest it, conclusively determined¹ the priority of that location over every other, including the Stemwinder, and conferred upon the patentees and their successors in interest not only the entire surface of the claim, but² the extralateral right conferred by section 2322 of the Revised Statutes to follow on their dip outside of the side lines, and within vertical planes drawn through the parallel end lines extended in their own direction, all veins, lodes, and ledges, the tops or apexes of which lie inside the surface lines of the claim.

From these views it results that the plaintiff in error was awarded more by the court below than it was entitled to, and therefore has no just cause to complain.³ But for its failure to contest the application of the Last Chance Company for

¹ ²This opinion altered in the case between same parties on cross error, by inserting at these points a clause confining the conclusive determination to cases where there was a surface conflict. *Empire State Co. v. Bunker Hill Co.* 114 Fed. 420; 22 M. R. —.

³Restored to defendant in error by its case on cross error. *Id.*

the patent to its claim and the issuance of that instrument, we should feel obliged, for the reasons first hereinbefore stated, to award the Stemwinder the right to follow the dip of the vein in question outside of its westerly side line and between vertical planes drawn through its end lines, a, b, c, d, extended in their own direction, as against the government and all subsequent locators, saving only the surface and underground rights conceded to the Emma claim. As it is, we must affirm the judgment.

Judgment affirmed.

KENNEDY J. HANLEY V. CHARLES SWEENEY ET AL.

(109 Federal 712. Circuit Court of Appeals, Ninth Circuit. May 6, 1901.)

Procuring deed by fraud. Where, by fraud and misrepresentation to defendants' agent, complainant procured the insertion of his name as purchaser in an order confirming an administrator's sale of an interest in a mine and in the administrator's deed, when defendants' bid was the only one received and acted on, a court of equity should not assist him to retain the benefit of his fraud by setting aside a subsequent deed, which the administrator was compelled to issue to defendants by mandamus in the state courts.

Concealment of value. Tampering with escrow. The parties were partners in certain mining enterprises, and jointly owned an interest in a claim, in which complainant also owned a separate interest. Defendants, by tunneling from an adjoining mine, managed by them, discovered an extensive and valuable vein of ore in such claim, and, concealing such fact from complainant, procured an option on his interest, and execution and delivery in escrow of a deed therefor, and afterwards, by fraud, and without payment therefor, obtained possession of the deed. *Held*, that such deed should be set aside as fraudulent and void, both because of such concealment and because never delivered.

Where parties in charge of a mine owned by a corporation suppress a valuable discovery and prevent a stockholder from access to the mine, taking active steps to prevent his acquiring knowledge, it is a fraud upon proof of which a purchase of his stock should be set aside.

Proof is admissible that defendant had salted the same mine on attempted sale to other persons. *Mudsill M. Co. v. Watrous*, 18 M. R. 1.

Where defendant is guilty of salting ore he can not shelter himself behind the plea of expression of opinion. *Id.*

Statement that land demised included a certain ore bed is a statement of fact and not of opinion. *Chatham F. Co. v. Moffatt*, 16 M. R. 103.

Party making representations liable, although not himself the owner. Representations made by or through third parties. *Sigafus v. Porter*, 84 Fed. 430.

Right of officers of corporation to underbid or cut out their com-

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

JOHN R. McBRIDE and M. A. FOLSOM, for appellant.

W. B. HEYBURN, E. M. HEYBURN, and L. A. DOHERTY, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a suit in equity, brought by the appellant, as complainant, to obtain a decree annulling two certain deeds made to the defendants Charles Sweeny and F. Lewis Clark,—one by the administrator of the estate of one David McKelvey, deceased, under an order made in a proceeding in mandamus, for an undivided one-third interest in the Skookum mine, situated in Shoshone county, Idaho; and the other by the complainant himself to the defendants Sweeny and Clark for an undivided one-eighth interest in the same mine. The complainant also, by his bill, asked for an accounting of the profits derived by the defendants from working the mine, and also sought an order appointing a receiver to take possession of and operate the property pending

pany in negotiations to lease or purchase. *Lagarde v. Anniston Co.* 20 M. R. 545.

Agent falsely representing that his principal was irresponsible procures contract in his own name. *Sun Dance Co. v. Frost*, 21 M. R. 252.

The assignee of an oil option is not bound by the fraud of his assignor in procuring possession. *National Co. v. Teel*, 95 Tex. 586; 67 S. W. 545.

Lessee obtained reduction of royalty on ground that he could not make a sale at the original royalty—afterwards he did make a sale on the original royalty—contract to reduce set aside. *Lasier v. Appleton Co.* 130 Mich. 588; 22 M. R. —.

No fraud where plaintiff knew the real facts—value of placer ground per yard treated as matter of mere opinion. *Martin v. Eagle Co.* 41 Oreg. 448; 69 Pac. 216.

the litigation. The claims of the complainant in respect to the two interests rest upon distinct and independent grounds. The one-third interest belonged to David McKelvey during his life. The record before us shows that that interest was first appraised in the proceedings had in respect to the estate of McKelvey at \$3,000, and that the complainant, Hanley, and the defendants Sweeny and Clark all wanted to get it. The Chemung Mining Company is also a factor in the case. That company was incorporated under the laws of the state of Washington by the defendants Clark and Sweeny and one W. E. Goodspeed, who, it appears from the evidence in this case, was a clerk in their office at Spokane; its articles of incorporation bearing date August 5, 1896, and its capital stock being declared to be \$2,500,000, divided into 500,000 shares of the par value of \$5 each. On the 11th day of August, 1896, an agreement in writing was entered into between the complainant, Hanley, as party of the first part, and the defendants, Clark and Sweeny, as parties of the second part, and witnessed by W. E. Goodspeed, by which Hanley, in consideration of the sum of \$5,000, paid and to be paid in certain specified amounts and at certain specified times, undertook to sell to Clark and Sweeny an undivided one-fourth

A conveyance for stock is conveyance for a valuable consideration, and no proof of fraud against creditors. *Homestead Co. v. Reynolds*, 30 Colo. 330; 70 Pac. 422.

Plaintiff filed a declaratory statement on coal land which gave her 14 months to perfect purchase. This declaratory statement was set aside by filing a forged relinquishment and defendants, or their grantors, secured patent. Complaint alleged fraud not discovered till a date later than the 14 months. Held no cause of action for want of averment that plaintiff had attempted to perfect title during her preemption period. *Gebo v. Clarke Fork Co.* — Mont. —; 75 Pac. 859.

Action against bank directors for fraudulent transfer of mining stock to themselves, which stock the bank had taken for a debt. Defendants held for the profits. *Morgan v. King*, 27 Colo. 539; 63 Pac. 416.

interest in those certain mining claims described as follows, towit: "The Jersey Fraction Mining Claim, the Lily May Mining Claim, the Carriboo Mining Claim, the Good Luck Mining Claim, and the Butte Mining Claim, all situate at Wardner, Yreka mining district, Shoshone county, Idaho, and west of the Last Chance Mining Claim;" the agreement proceeding to provide as follows:

"The party of the first part also agrees that all of the titles to these properties shall be cleaned up by him, and that said properties shall then be deeded to the Chemung Mining Company, of Spokane, Washington, the owners of which shall be as follows: Chas. Sweeny, one-half interest of said company; F. Lewis Clark, one-fourth interest of said company; and Kennedy J. Hanley, one-fourth interest of said company. The parties hereto agree to set aside one-fifth of their holdings of the stock of said company, respectively, to be used for treasury purposes. The money to clean up the title of the said properties, not to exceed the sum of five thousand dollars, to be furnished by the parties of the second part in sums as required under the direction of Chas. Sweeny."

The undisputed evidence in the present case is that of the 500,000 shares of the stock of the Chemung Mining Company Hanley owned 100,000 shares, Clark and Sweeny 300,000 shares, and that 100,000 shares were held as treasury stock of the company. The Skookum was a neighboring

Where one mining company secures the control of the directory of another mining company and procures bond and lease on its property, such contract will be set aside without regard to its terms or fairness. *Glengary Co. v. Boehmer*, 21 M. R. 74. See *Pierce v. Old Dominion Co.* — N. J. —; 58 Atl. 319.

Defendant received of plaintiff \$1,000 and was to raise \$64,000 from other persons, buying a mine for \$60,000 and giving the company \$5,000 capital. He bought the mine for \$10,000 and kept \$50,000. Right of single contributor in such case, stated. *Barbour v. Hurlburt*, — Mich. —; 100 N. W. 781.

Expressions of opinion as to value may amount to fraud where the parties do not stand on equal terms; experienced dealer buying timber from aged spinster. *Chess & Wymond Co. v. Simpson*, — (Ky.) —; 82 S. W. 601.

mining claim, the interest of the McKelvey estate in which, the evidence leaves no room to doubt, Hanley, Clark, and Sweeney wanted to acquire, and wanted to get for as near nothing as possible. This is shown not only by the testimony of each of them, but by documentary and other evidence that we find in the record, a part of which will be mentioned. The order of the probate court under which the McKelvey interest in the Skookum mine was undertaken to be sold and conveyed by the administrator of the estate is referred to in the brief of appellant's counsel, and in parts of the record, as having been made December 5, 1896, although the order itself appearing in the record purports to have been made November 30, 1896. Clark and Sweeney were the principal officers of the defendant Empire State-Idaho Mining & Developing Company, of which one W. Clayton Miller was resident manager and consulting engineer. A. G. Kerns was the attorney of the Chemung Mining Company. On the 14th day of December, 1896 (but a few days after the making of the order by the probate court of Shoshone county for the sale of the McKelvey interest in the Skookum mine), Clark wrote to Miller as follows:

"I have tried for three days to get you by telephone, but have failed. After full consultation with Mr. Hanley, it seems to me, if he can buy McKelvey's claim on the Jersey for about the sum net to us, viz. \$400, that he expects to get it for, it better be done now on general principles, and to get through with it; and if at the same time he can, by paying \$100 or so, obtain an option on one-third of the Skookum at about \$700, so much the better. It does not seem to me, however, that we better put off too long in getting the Jersey interest cleaned up. I should not want to enter into an agreement to buy the Skookum, but would be willing to pay one hundred dollars or so to get an option on the interest. If you and Mr. Hanley think best, however, to postpone the Jersey matter, I shall be satisfied to rest upon your judgment."

Following this letter in the record, but without date, is the following:

"My Dear Kerns: Mr. Clark appears to have changed his mind, and I think now the best you can do is to put Kennedy [Hanley] onto the best and quickest way for him to close for the interest at his bid. He should, at the proper time, put it in as writing. As to Skookum, find out, and let me know; but do nothing now. Miller."

Immediately following is this telephone message from Clark to Hanley:

"Mr. Miller telephoned, requesting that you immediately telegraph or telephone Cunningham [who was the administrator of the McKelvey estate] withdrawing your bid on the Jersey tract. By so doing Miller says we can get a reappraisal to better advantage. Please comply. Just withdraw your bid, and give no reasons. You can telephone me at my house, 255, after 6:30 p. m."

At the time of the making of the order by the probate court of Shoshone county authorizing the administrator of the McKelvey estate to sell its interest in the Skookum mine, that interest stood appraised at the sum of \$3,000. Hanley had bid therefor the sum of \$700. The statute of Idaho provided that no bid should be accepted which was less than 90 per cent of the appraised value of the property. No other bid appearing to have been made, the McKelvey interest in the Skookum mine was again appraised in February, 1897, and that time at \$760. The administrator of the estate again published and posted notice that he would sell the interest on May 1, 1897, and invited bids therefor. In his return to the probate court of the sale made by him, the administrator, after setting out the notices that he caused to be published and posted, stated:

"That on the 1st day of June, 1897, this administrator received an offer or bid of seven hundred dollars for the undivided one-third interest in the Skookum lode mining, situated in Yreka district, Shoshone county, state of Idaho, from the Chemung Mining Company. That being the only bid filed with me, and that being the highest and only bid for the same, I did on said day sell said real estate to the said Chemung Mining Company, the purchaser thereof,

and request that said sale be confirmed; and, further, that the court fix a date and place for a hearing upon said sale."

This return was made and filed June 15, 1897, but was not verified, as was required by the Idaho statute. On the 18th of June following, an order was made by the probate court designating June 30, 1897, at 10 o'clock a. m. of that day, at its court room in the town of Murray, Shoshone county, as the time and place for the hearing of the return, at which any person interested might appear and file written objections to the confirmation of the sale. That hearing was continued to July 26, 1897, on which day Hanley and the administrator appeared in court, as also W. W. Woods, who had theretofore been the attorney for the administrator in the matter of the estate of McKelvey. Hanley's testimony is to the effect that, after the making of the \$760 appraisement, and after the publication of the notice of sale pursuant to that appraisement, he presented to the administrator a bid of \$700 for the McKelvey interest; but such a bid, if made, does not appear among the files of the estate in the probate court, and has not been produced. As a matter of fact, however, the night before the 26th day of July, 1897, Hanley gave to the administrator \$750, which he said was a raise of \$50 on his bid. The paying of this money in advance of any confirmation of the sale, and before the petition of the administrator for its confirmation to the Chemung Company had come on for hearing, is one of the many peculiar circumstances attending the attempted disposition of the McKelvey interest. Concerning what took place the next day, July 26th, when the matter of the sale came up before the probate court, there is some conflict in the testimony. The bid of the Chemung Mining Company was submitted to the administrator by A. G. Kerns, its attorney, who resided at Wallace, Idaho, and who had an office with Mr. Woods at that place, and who requested Mr. Woods to attend the confirmation pro-

ceedings at Murray, the county seat (to which place he was going), and look after the bid of the Chemung Company. Woods' testimony is to the effect that he went into the office of the probate judge for that purpose in the forenoon of July 26th; that Cunningham, the administrator, and the probate judge, were there; that subsequently Hanley came in; "but," said the witness, "the first inquiry addressed to me was by Mr. Cunningham [the administrator], who stated that there had been a raise of \$50 upon the bid then in. And he and Judge Whalen [the probate judge] wanted my opinion as to what to do in the matter. I inquired as to whether the advance was by the same bidder, and Mr. Cunningham replied that it was the same bidder, and that he had voluntarily raised his bid \$50. I said, 'That is a rather queer proceeding,' and I took down the statutes, and called their attention to the provisions of the statute that, if a bid was not raised to the extent of ten per cent, it would not require a new publication. I said, then, in my opinion there was no objection to the administrator taking \$50 more for the benefit of the estate, if it was the same bidder, and that my advice to the probate judge would be to confirm the bid as made, and not mention that \$50; and my advice to Cunningham as administrator was to take it up on his account for the benefit of the estate, and confirm the bid which was already in writing. That is all that I remember of that transaction, except they agreed to act upon the advice. The administrator and the probate judge both agreed upon that course of conduct." The witness further stated that the administrator requested him to have a deed prepared when he returned to Wallace, and he replied that he would speak to Mr. Kerns about it. As a matter of fact, the probate judge himself, on the same day, to wit, July 26, 1897, prepared an order confirming the sale to the complainant, Hanley, and he testified in this suit that when he was making out that order Hanley, Woods, and the administrator were all present, and that while doing so

he asked in the presence of all three of them, "Whom will I make this out to?" and that Hanley replied, "Make it out to me; it is my own money that is paying for it;" and that Woods assented thereto. If that testimony of Hanley is true, Woods could not be a man of honor and integrity, as complainant's counsel here concedes him to be; for he attended the confirmation proceedings at the request of the attorney of the Chemung Company, and for the purpose of having the sale confirmed to it in pursuance of its theretofore accepted bid. Woods' testimony is to the effect that nothing of the kind occurred. The probate judge signed the order confirming the sale to Hanley, and the administrator thereupon executed a deed to him purporting to convey to him the one-third interest of the estate in the Skookum mine. The 26th day of July, 1897, was a day of the regular July term of the probate court of Shoshone county, section 3843 of the Revised Statutes of that state providing that:

"The terms of the probate court in the several counties for the transaction of all probate business, except that specially authorized by law to be done in vacation, must be held on the fourth Monday in each month. For the transaction of all civil, other than probate business, and all criminal business, these courts are always open."

The next section is as follows:

"The terms of the probate court must be held at the county seats. There shall be a clerk of said court to be appointed by the judge thereof, or the probate judge may act as clerk of his own court. Every probate judge shall be responsible upon his official bond for every default or misconduct in office of his clerk."

On the 12th day of August, 1897, Kerns, who had presented the bid on behalf of the Chemung Mining Company, appeared at the office of the probate judge, and stated to him that a mistake had been made in confirming the sale to Hanley, and that the Chemung Mining Company was the party

entitled to the deed; that Hanley's conduct and representations by which he had procured the confirmation and deed to himself were fraudulent. And Kerns presented to the probate judge an order reciting, among other things, that the matter of the confirmation of the sale came on regularly to be heard July 26, 1897, the administrator appearing in person and by his attorney, W. W. Woods, and "Kennedy J. Hanley appearing in person representing himself to appear on behalf of the purchaser at the administrator's sale, and the court having examined the said return and heard the testimony of witness in support thereof," and it duly appearing to the court that in pursuance of the order of sale the administrator caused the proper notice to be posted and published, and that the sale was made to the Chemung Mining Company, and further reciting "that on the 26th day of July, 1897, and order was made by this court confirming the sale of said real estate and mining premises in one Kennedy J. Hanley, and directing said administrator to execute proper and legal conveyance thereof to said Hanley upon the same bid of \$700; and it appearing to the satisfaction of the court that such order confirming said sale in Kennedy J. Hanley was obtained by misrepresentation and fraud upon the part of said Kennedy J. Hanley in pretending to represent the said Chemung Mining Company,"—proceeded to vacate and annul such order and deed, and to confirm the sale to the Chemung Mining Company, and to direct the administrator to execute a conveyance of the McKelvey interest to that company. The probate judge at first refused to sign the order so requested by Kerns, but subsequently, being urged to do so, and, as he testifies, being threatened by Kerns with a suit if he did not, affixed his signature to the order, without any notice to Hanley, and without any proof of any kind. The order was then left with the probate judge, who, under the provision of the Idaho statute, acted as clerk of his own court, and who subsequently advised the administrator that

the order so signed was void. The administrator, upon demand made on behalf of the Chemung Mining Company, refused to execute a deed to it for the interest of the McKelvey estate in the Skookum mine, and thereupon that company applied to the district court of Shoshone county for a writ of mandamus to compel the administrator to make the conveyance directed by the order. The district court decided that it was the duty of the administrator to obey the order of August 13, 1897, and the supreme court of the state on appeal affirmed the judgment. *People v. Cunningham* (Idaho), 53 Pac. 451. The administrator having, subsequent to the decision of the district court, deposited a conveyance, as required by the statute of the state, to abide the appeal, that conveyance was, after the decision of the supreme court, delivered to the Chemung Mining Company, and was put on record in the county in which the property is situated; and its title, if any, was thereafter conveyed to the defendant Empire State-Idaho Mining & Developing Company.

In the view we take of the present case, it is not necessary to consider the legal effect of the very peculiar proceedings in the probate court, nor to determine the effect of the decisions of the state courts of Idaho in the cases growing out of them which have been brought to our attention; for we are clearly of the opinion that in respect to the McKelvey interest the complainant is not, by the facts and circumstances of the case, presented in such an attitude as that a court of equity should afford him any relief in respect to that interest. The evidence leaves no room for doubt that the intent of the complainant and of the defendants Clark and Sweeny was to acquire the group of claims of which the Skookum was one, in common ownership, although in different proportions. The three were the sole owners of the stock of the Chemung Mining Company, which company bid \$700 for the interest of the McKelvey estate in the Skookum mine. Of that bid the administrator, of course, had actual notice, for it was

made to him; and in his return to the probate court he expressly stated that under the proceedings had pursuant to the \$760 appraisement of that interest he had sold it to the Chemung Mining Company, and asked the confirmation of the sale to it; and, furthermore, the administrator, in his return, expressly stated that the bid of the Chemung Company was the only bid he had received for that interest. Hanley, like every one else dealing with the administrator in respect to that interest, is certainly chargeable with constructive notice of the matters stated in that return, and we think the circumstances of the case irresistibly lead to the conclusion that he had actual notice of the bid of the Chemung Company, and that the administrator had reported to the court his sale of the interest in question to that company; otherwise, why should he have paid to the administrator \$750 the night before the day the hearing of the administrator's petition for the confirmation of his reported sale to the Chemung Company for \$700 was to be had? Hanley claims to have himself theretofore made to the administrator a bid of \$700 for that interest, which bid, however, nowhere appears among the papers of the estate, nor was it produced in this case; and the administrator, in effect, reported to the court that no such bid had been received by him, for, as has been seen, he expressly stated in his return that the only bid he received for the property was that of the Chemung Mining Company. If it be true, as claimed by the complainant, that he had in fact bid \$700 for the McKelvey interest under and pursuant to the order of sale of November 30, 1896, and it be further true that Hanley did not, in fact, know of the bid of the Chemung Company, then, and in that event, his voluntary raise of his own bid, in the absence of any other, is "peculiar," to say the least. In that view his action has not been, and cannot be, satisfactorily explained, unless it be based upon some sort of philanthropic motive, which, under the facts and circumstances of the case, we would hardly be justified in at-

tributing to either him or the defendants Clark and Sweeny in their efforts to acquire the McKelvey interest. If, on the other hand, it be true that Hanley did actually know of the bid of the Chemung Mining Company, and it be also true that he himself had also bid \$700 for the same interest, the statements made and assented to by Hanley and the administrator before the probate judge in the presence of Woods, when the matter of the confirmation of the sale came on for hearing on the 26th of July, 1897, cannot be explained consistently with good faith and fair dealing either on the part of Hanley or the administrator. The counsel for the appellant here concedes that Woods, who had been requested by Kerns to look after the confirmation of the sale to the Chemung Company in pursuance of its accepted bid, did not know of any bid of Hanley, or any other party than the Chemung Company. Therefore, when told by the administrator, in the presence of Hanley and the judge, that the bid had been raised, and when in response to his question, "By whom?" he was informed that it was by the "original bidder," he very naturally said such a proceeding was "queer." Being there in the interest of the Chemung Company, if either Hanley or the administrator had said that the \$50 raise was by Hanley, Woods would have at least had the opportunity of seeing that the sale made to the Chemung Company pursuant to its bid, and reported by the administrator for confirmation, was not, as in fact it purported to be, confirmed to Hanley for the similar sum of \$700. This manifest deception of the representative of the Chemung Company, coupled with the facts that the administrator had theretofore accepted the bid of that company, and so reported to the court, expressly stating at the same time that there was no other bid, and no other bid being in fact produced, supplemented by the extraordinary payment by Hanley to the administrator of the \$750 the night before the day set for the hearing of the administrator's petition for the con-

firmation of his previously reported sale to the Chemung Company for \$700, and the withholding of notice of such payment from the court as well as that company when the accepted bid of the company came up for consideration, discloses such deceit and fraudulent practices as preclude any and every person in any manner engaged in them from the aid of any court of equity.

But all of the fraud in the case was by no means committed by the complainant. The one-eighth interest in the Skookum mine here involved was confessedly the property of Hanley. So were 100,000 shares of the stock of the Chemung Mining Company. In respect to that interest the court below held that Hanley dealt with the defendants Clark and Sweeny at arm's length. There is not the slightest doubt that the letters from Hanley to O'Neil, introduced in evidence, and written a few weeks before the making of the contract of April 30, 1898, show that there was an absolute want of confidence on his part in either Clark or Sweeny, so that the court below was quite right in saying that any pretense that in the agreement to dispose of his one-eighth interest Hanley relied upon any representations of Clark and Sweeny, or either of them, was without any valid support. But that is no answer to the proposition that they fraudulently withheld from their co-owner the facts in respect to the discovery of ore in the Skookum mine, made in pursuance of the work prosecuted by the company, in which he was a stockholder, and at his expense, of course, as well as theirs. That they did so withhold and conceal such facts is abundantly shown by the record, and, indeed, affirmatively appears from their own testimony. The Skookum mine was reached underground only through a tunnel that had its commencement in the ground of the Last Chance Mining Claim, of which the defendants Clark and Sweeny were the principal owners, and of which one Presley was superintendent. The underground work done in the Skookum mine was done also

under the superintendency of Presley, and engaged under him was, among others, a shift boss named Kendall. Presley's testimony is to the effect that in running the diamond drill into the Skookum ground, under the direction of Clark and Sweeny, he discovered, about April 24 or 25, 1898, a body of ore in the Skookum, into which, by the 30th day of that month, a drift had been driven about 35 or 40 feet, disclosing a body of ore of such dimensions and value as that Presley, when asked to give his estimate of the value of the Skookum mine in its condition on the 30th of April, 1898, when the contract between Hanley and Clark and Sweeny was made, answered: "Judging from the prices you would have to pay for mines similar to that, it would be in the neighborhood of two hundred and fifty or three hundred thousand dollars. I don't know that you could get one for that price that was similar." Presley further testified that Clark and Sweeny were fully apprised of the ore discovery, but that Hanley was not, and, what is more, that Hanley was kept in ignorance of it by the express orders of Clark and Sweeny. We extract from his testimony:

"Q. By Complainant's Counsel: I will ask you if, during the month of March or April, 1898, any application was made to you by Mr. Hanley to go into that mine and examine it? A. Yes, sir. Mr. Hanley asked me if he could go through the mine. Q. Did he state any reason why he wanted to go into the mine? A. He said he had interests in the mine, and that he was entitled to go through. I told him I was instructed by Mr. Sweeny not to allow him to go into the mine. Q. State whether or not, acting under those directions, you prevented him from going. A. Yes, sir; I prevented him. Q. What did you say to him? A. I merely told him that he could not go in the mine; that I was prohibited from allowing him to go into the mine. Q. Do you recollect whether he asked you more than once the privilege of going in? A. Yes, he did. I believe he asked just before he gave an option on his interest to Sweeny. Q. How long before? A. Well, I think it was the day before, if I remember right, or a day or two. I don't just remember. I know it was shortly before. Q. And you prohibited him from going in under the direction of Mr. Sweeny? A. Yes, sir. Q. Did you tell Mr. Hanley about what

the true condition of the mine was at that time, or did you give him any information about it? A. I told him there was nothing in there to speak of. Q. I will ask you now if Mr. Sweeny instructed you or Mr. Clark not to disclose the condition of the mine to either Mr. Hanley or anybody else? A. Yes, sir; I was instructed so by Mr. Sweeney. Q. And you did not? A. No, sir; I did not. Q. Did you know anything about the negotiations between Hanley and Sweeney and Clark about the sale of his interest in the Skookum mine? A. Yes, I did. Q. Did you know anything about those negotiations either from Mr. Sweeney, or Mr. Clark, or both of them? A. I did not know personally through them, but I knew that they were making a deal. Q. That was before the deal was made, as you understood? A. Yes, sir. I knew it at the time. Q. You knew it was in contemplation? A. Yes, sir. Q. Did you have any conversation with them, or either of them, about their having made a deal with him, after it was done? A. Nothing only what Mr. Sweeny told me. Q. Mr. Sweeny told you? A. Yes, sir. Q. About what time was it that he told you? A. Well, if I remember rightly, it was about the first of May of 1898. Q. What did he say about his negotiations with Hanley about the deal? A. He came up from Spokane one afternoon, and in the evening about 7 or 8 o'clock he told me that he had secured an option on Kennedy Hanley's interest in the Chemung for \$20,000, and his interest in the Skookum for \$10,000. Q. Did you know what Mr. Hanley's interest was in the Chemung,—what it consisted of? A. I understood it to be a third and an eighth. Q. No; I mean in the Chemung, not in the Skookum. A. Oh! in the Chemung. I understand he had some stock, and some interest besides, in the first; but I don't know what it terminated in afterwards. Q. What interest did Mr. Sweeny say he had got in the Chemung? A. Why, he didn't state in particular what interest it was. He said he had his interest in the Chemung for \$20,000, all his interest. That is all I heard him say. Q. And what did he say about the Skookum? A. He said 'an option on his interest in the Skookum for \$10,000.' "

Presley further testified that Kendall was the shift boss in charge of the work that penetrated the ore body referred to, and that about the latter part of May, 1898, he (Presley) discharged him. When asked why, Presley answered:

"Why, he came to me a short time before,—I don't remember the time,—but he asked me questions in regard to the Skookum ground, and if Kennedy Hanley did not own interests in there. I did not make him any answer. I simply laid him off the first opportunity

I got. Q. What was the reason? Why did you lay him off? A. Well, my instructions were to not allow any one to know any more about it than possible. That was one of the reasons. Q. Was it not, Mr. Presley, for the purpose of protecting the interests of your employers, Sweeny and Clark? A. Yes, that was my idea of it, and that is what I tried to do right along. Q. Did you ever admit any other person into that mine along about that time? A. Why, I never admitted any one at my own responsibility, unless they were with Mr. Sweeny. Mr. Sweeny brought some men there with him,—some that come from the East. Q. When did he bring men there. A. Along the first of May."

Kendall's testimony is to the effect that shortly before his discharge, and about the time the ore was struck in the Skookum mine, he told Presley that he had met Hanley on the street the evening before, and that Hanley had asked him "concerning this drift,—how far we were in, and if we had any ore, and I said I gave him no set answer. He kind of smiled, and says, 'Well, maybe he has an interest in it,' and walked off." The witness further said that he did not think that he told Presley exactly what he had replied to Hanley, and in answer to the question, "But you did not tell Hanley anything?" answered: "No, not exactly. I told him there was some ore. I did not give him any decided answer." And Kendall was discharged for the reason already stated. Clark himself says in his evidence that, when asked by Hanley concerning the mine, he said that they "had some encouragement," but he expressly states that he omitted "details." He further admitted in his testimony that the "fairness" of contracting for Hanley's interest without telling him what he knew "was not considered" by him. Yet within a few days of the discovery of the large and valuable ore body in the mine, Clark telephoned to Hanley, requesting him to come to Spokane, and on his arrival met him at his hotel, and began negotiations which culminated in the contract of April 30, 1898. A grosser fraud upon a co-owner of the property it is difficult to conceive. Now, what was the contract of April 30, 1898? At that time the man-

damus proceedings against the administrator of the McKelvey estate to compel him to execute a deed for the one-third interest of that estate in the Skookum mine to the Chemung Mining Company in pursuance of the order of the probate judge made August 13, 1897, were still pending in the supreme court of the state of Idaho, and that interest was then still being claimed by Hanley under the deed executed to him by the administrator, and by Clark and Sweeny as the property of the Chemung Mining Company. The proposition made by Hanley to Clark and Sweeny on that day, under and pursuant to the negotiations initiated at their request, was in writing, and is in evidence. It is as follows:

"My proposition is this: I will sell my one hundred thousand (100,000) shares in the Chemung Co. (at 20 cents a share) for twenty thousand dollars (\$20,000.00). I will sell my $\frac{1}{2}$ and $\frac{1}{8}$ interest in the Skookum claim at the rate of thirty thousand dollars for the whole claim.

"Spokane, April 30th, 1898.

K. J. Hanley."

Hanley's testimony is to the effect that throughout the negotiations leading up to the contract he refused to sell the one-eighth interest in the Skookum mine, which he confessedly owned, without including also the McKelvey one-third interest, which was in dispute between the parties; and the defendant Clark himself seems to admit as much, although his testimony is to the effect that Hanley finally agreed otherwise. On his cross-examination Clark was asked:

"Q. Did Mr. Hanley at any time ever offer to sell you either the one-eighth or the one-third interest in the Skookum mine separately from the other interest—separately from each other? A. He did offer to sell them separately from each other. Well, that is to say—No, he never at any one time said— He never at any one time entered into negotiations about the one-eighth without having a negotiation at the same time about the one-third. Q. The negotiations always covered both of his claimed interests, you denying that he had any interest in the one-third, and he claiming that he had, and you admitting that he owned a one-eighth interest? A.

I think I asked Hanley at one time to put a price on everything he owned and everything he claimed up there, and he, in general, answered that he wanted to put a price on the whole of it; but when he came down to actually agreeing upon something we agreed as I have said."

The written proposition of Hanley, by which he offered to sell the one-third and one-eighth interests at the rate of \$30,000 for the whole claim, would, as will readily be seen, make those interests amount to something over \$12,000, and Hanley admits that in the subsequent discussion of his written proposition he receded from that to the extent of finally agreeing to take for those two interests \$10,000, and \$20,000 for his 100,000 shares in the Chemung Company. The testimony of Clark and Sweeney, on the other hand, is to the effect that the final agreement was \$20,000 for the Chemung stock and the one-eighth interest in the Skookum mine, and \$10,000 for the McKelvey one-third interest. It is not disputed that the papers in respect to the transaction were to be, and in fact were, placed in escrow. The papers were prepared in the office of Clark and Sweeney on Saturday morning, April 30, 1898, in some haste, in order that they might be deposited in a bank before the closing hour of 12 o'clock of that day. Separate deeds were prepared for the two interests in the Skookum mine, and each was signed by Hanley in Clark and Sweeney's office. All three of them at the same time signed an indorsement upon each of two envelopes prepared by a clerk of Clark and Sweeney, and under the latter's dictation, one of which reads as follows:

"This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions: If Chas. Sweeney and F. Lewis Clark shall pay into said bank, for the credit of Kennedy J. Hanley, eighteen thousand dollars (\$18,000.00), on or before July 1st, 1898, then this envelope, with its contents, shall be delivered to said Sweeney and Clark; otherwise, it shall be delivered to Kennedy J. Hanley.

"Dated at Spokane, Wash., this 30th day of April, A. D. 1898."

And the other:

"This envelope is placed in escrow with E. J. Dyer, cashier of the Exchange National Bank of Spokane, Wash., on the following terms and conditions: If Chas. Sweeny and F. Lewis Clark shall pay into the said bank for the credit of Kennedy J. Hanley ten thousand (\$10,000.00) dollars on or before August 1, 1898, then this envelope, with its contents, shall be delivered to said Sweeny and Clark; otherwise, it shall be delivered to Kennedy J. Hanley.

"Dated at Spokane, Wash., this 30th day of April, A. D. 1898."

There is no dispute in the evidence in respect to the fact that under the terms of the agreement of sale, whatever they were, Hanley was to be, and in fact was, paid \$2,000 in cash in consideration of the options; and Hanley's testimony is to the effect that after the signing of the deeds and the indorsements upon the two envelopes he placed in the envelope requiring the further payment of \$18,000 the certificate for the 100,000 shares of the stock in the Chemung Mining Company, and in the other envelope the two deeds for his interest in the Skookum mine, and that the three parties then left the office, and went to the bank, taking the papers along. At the bank was a notary public, before whom Hanley acknowledged the execution of the deeds, and received from Clark and Sweeny a check for \$2,000. It is contended on behalf of Hanley that, while he went to the desk of one of the bank clerks to make some arrangement in respect to the check, and after the notary had returned the deeds with his certificate of acknowledgement thereon, Sweeny fraudulently put the deed for Hanley's undisputed one-eighth interest in the Skookum mine in the envelope with the certificate of stock in the Chemung Mining Company, containing the indorsement requiring the additional payment of \$18,000, and in the other envelope placed the deed covering the McKelvey one-third interest in the Skookum mine, and in that condition the envelopes were sealed, and left with Dyer in escrow. The testimony of Clark and Sweeny is to the effect that the papers

were so placed, not only with the knowledge of Hanley, but that it was the distinct understanding and agreement that they should be so placed; the contract, according to their testimony, being that the \$20,000 sale and purchase, if consummated, should embrace both the Chemung stock and the one-eighth interest in the Skookum mine, and that the \$10,000 sale and purchase, if consummated, should embrace only the McKelvey one-third interest in the mine. There is no doubt that some support is added to this contention by the fact that separate deeds were executed for the one-third and one-eighth interest, while one might have been made to embrace both, and by the further fact that in one of the indorsements the time fixed for the exercise of the option was July 1, 1898, and in the other—that in fact covering the deed for the McKelvey one-third interest—was August 1, 1898, which latter date Clark and Sweeny testify was so fixed in order to give more time for the decision by the supreme court of Idaho of the mandamus case. But it must be remembered that all of the papers were prepared by Clark and Sweeny, and that it was at their suggestion that separate deeds were executed; and, while the fixing of August 1, 1898, as the date for the taking up of the deed for the McKelvey interest was very likely for the purpose of allowing more time for the decision of the mandamus case, that fact makes but little against Hanley's contention that the envelope bearing that indorsement was also to contain the deed covering the one-eighth interest. There can be no doubt that Hanley's proposition was to sell his stock in the Chemung Company for \$20,000, and both of the interests claimed by him in the Skookum mine together for something over \$12,000. There can be no doubt of that fact, for the proposition was in writing, and is in evidence. We think it quite certain, also, that throughout the negotiations preceding the final agreement Hanley insisted that the two interests, one of which he confessedly owned, and the other claimed by him, should go to-

gether, and that he would not sell to the defendants Clark and Sweeny one without selling both; for such is not only Hanley's testimony, but is practically admitted by Clark. From his written offer it appears that Hanley valued his stock in the Chemung Company at \$20,000, and both interests in the mine together at but little over \$12,000. And in the discussion that resulted in Hanley's reducing his price for those two interests to \$10,000 it does not appear that Clark or Sweeny objected to his demand of \$20,000 for the Chemung stock. Under such circumstances it does not appear to us reasonable, or at all probable, that Hanley would, as Clark and Sweeny contend he did, have finally agreed to sell the one-eighth interest in the mine, which he admittedly owned, in addition to the 100,000 shares of the stock of the Chemung Company, for \$20,000. In that view, also, \$10,000 would certainly appear to be an extraordinary and extravagant price for Hanley to demand, and Clark and Sweeny to agree conditionally to give, for the disputed one-third interest in the same mine. It appears further that on the 6th or 7th day of June, 1898, Clark and Sweeny applied to Hanley for an extension of the time within which to take up the escrows. They wanted until October 1, 1898, and agreed to pay Hanley \$2,000 therefor, to be applied on the purchase price. Hanley objected to making the extension run to October 1st, and September 20, 1898, was finally agreed upon. Clark testified that they only wanted the extension to apply to the Chemung stock and the one-eighth interest in the mine, as the supreme court of Idaho a short time before had affirmed the decision of the trial court in the mandamus case; but that Hanley insisted that it should also apply to the one-third interest therein, as he wanted "to keep on making this fight." The record shows that there was at that time a petition pending in the supreme court of Idaho for a rehearing of the mandamus case, which, however, was finally disposed of within a few days thereafter by a denial

of it. This statement of Clark as to their wishes in regard to the extension sought cannot be reconciled with the statement of Hanley, which is not denied, that Sweeny applied for a further extension of time within which to take the one-third interest in September, 1898. As a matter of fact, the extension was granted in the case of each of the escrows, that on the envelope calling for the additional payment of \$18,000 in these words:

"I hereby extend the above escrow to Sept. 20th, 1898.

"Spokane, W., June 6, '98.

Kennedy J. Hanley."

—And that on the envelope calling for the payment of \$10,000:

"I hereby extend the above escrow to Sept. 20th, 1898.

"Spokane, W., June 7, '98.

Kennedy J. Hanley."

The \$2,000 payment in consideration of the extension was evidence by writing as follows:

"Spokane, June 7, 1898.

"E. J. Dyer, Cash.: This is to certify that Clark and Sweeny have paid \$2,000.00 on the \$18,000.00 escrow agreement due Sept. 20, 1898; so that only \$16,000.00 is due on same.

Kennedy J. Hanley."

Clark testified that, as soon as the papers were left in escrow at the bank on April 30, 1898, he went back to his office, where Goodspeed, his clerk, said to him, "Give me a description exactly what those envelopes contained, so that I can keep track of them," and that he replied "that the \$18,000 envelope,—the one that we were required to pay on July 1st,—contained an eighth interest in the Skookum and 100,000 shares of Chemung stock," and that the other contained "one-third interest to the Skookum property, which was payable on August 1st," and that Goodspeed "at once sat down and prepared a copy of the two escrow agreements, and added to

each copy the distinguishing statement that I made to him," which were afterwards put in their letterpress book. Clark further testified that at the time he and Hanley were talking about the June extension he called for the letterpress book, and read to Hanley therefrom a "description of the escrows, and the memorandum which described what the envelopes contained, which," added the witness "was necessary for me to know and for Mr. Hanley to know in order to know what we were paying on when we went down to the bank." This statement of Clark is denied by Hanley, who says that the letterpress book was not shown to him in June at all, but was shown to him by Sweeny on the 17th of September, whereupon he disputed it, and went at once to the bank, and told Dyer, "I am dealing with two rascals, and I want you to watch the escrows." Although Dyer was a witness on behalf of the defendants, he was not asked anything in respect to this testimony of Hanley. While the indorsements on the envelopes did not mention their contents, the amounts specified to be paid as a condition to their delivery plainly showed the one that covered the Chemung stock, and also—if Clark and Sweeny's version of the agreement be true—the deed for the one-eighth interest in the mine. There was, therefore, no such necessity as that testified to by Clark of resorting to the memorandum that he had caused to be entered in the letterpress book of Clark and Sweeny, nor any occasion whatever to resort to anything but the indorsements on the envelopes to know which covered the Chemung stock; for the balance required to take up the contents of that envelope was there expressly declared to be \$18,000. If the agreement really was, as is contended on the part of the defendants, that that envelope should—as in fact it did—also contain the deed for the one-eighth of the Skookum mine, there would not have been the slightest occasion for Clark or Sweeny to have called Hanley's attention to any memorandum that they made in their office in respect to the matter. The fact of the making

of the memorandum, and especially Clark's testimony in respect to it, we cannot but regard as suspicious. Looking at all of the facts and circumstances of the case, and carefully weighing them, we are satisfied that the truth is that the one-eighth interest in the mine was not, by the agreement of the parties, coupled with the Chemung stock; that the deed therefor was improperly placed in the envelope containing the stock; and that Clark and Sweeny received it without consideration, and in fraud of Hanley's rights. The judgment is reversed, and cause remanded to the court below for further proceedings not inconsistent with this opinion.

JOHN MADISON ET AL. V. GARFIELD COAL CO. ET AL.

(114 Iowa 56; 86 N. W. 41. Supreme Court. May 15, 1901.)

Construction of lease with the holding that the instroke right to work other coal through the shaft on the demise continued after exhaustion of the leased coal.

Right to exercise at once. The privilege of instroke being granted generally, is presumably to be exercised at once, or at any time without waiting until the demised coal has been worked out.

Res adjudicata. In a prior suit for injunction wherein the right of lessee to work by instroke had been denied by the plaintiff but his bill was dismissed on the merits: *Held* a final adjudication on the construction of the lease.

Appeal from District Court, Mahaska County.

A. R. DEWEY, Judge.

Plaintiffs are the owners of a tract of 80 acres of land (limited, however, by reservations to 73 acres), which was, in 1890, leased by them to defendants for the purpose of mining coal. Defendants have been using plaintiffs' land not only to mine coal therefrom, but also for the purpose of running out coal from adjoining land, which they have leased for mining purposes. Plaintiffs having, in 1891, at the time defendants commenced this additional use of plaintiffs' land, served notice on the defendants not to use their land for those purposes, now bring suit for damages in the sum of \$17,500 for this alleged improper use, including therein the dumping of waste on the surface. Defendants admit the execution of the contract, but deny that there has been any breach thereof, or any use of the premises inconsistent with their rights therein. They also plead a prior adjudication in their favor in an action brought in 1891 by plaintiffs to

¹*Webber v. Vogel*, 19 M. R. 639 and notes.

restrain them from this additional use, in which action plaintiffs' bill was dismissed. The court, before the plaintiffs had finished the introduction of evidence as to the amount of the damage, reached the conclusion that under the contract defendants had the right to make such use of the land as plaintiffs complain of, and therefore directed a verdict for defendants, and from the judgment against plaintiffs for costs the plaintiffs appeal. Affirmed.

J. C. WILLIAMS, GEO. W. SEEVERS, and B. W. PRESTON,
for appellants.

J. F. & W. R. LACEY and J. O. MALCOLM, for appellees.

McCLAIN, J. I. Although a prior adjudication, if it involved the construction of the contract now before us, would be conclusive in this case, we prefer to consider first the construction of the contract itself. Without setting it out in full, we may collect the provisions which are involved in this controversy as follows: By its terms the plaintiffs lease to defendants, for the purpose of mining coal, the said coal lands, and give them the power to mine and remove all coal underlying said lands. The defendants are to pay for all coal taken out of said mine at a specified royalty per ton, payable monthly, but the royalty for each year is to be not less than \$250, and if, during any year, the royalties paid have not amounted to that aggregate sum, then the balance of such sum is to be paid at the end of the year. This minimum royalty per year is to continue "as long as said mine is operated, not to exceed twenty-five years, but, if the coal is sooner mined out, then the royalties are to cease when the coal is exhausted." The defendants are given the right to secure necessary air and water shafts, and to place "the refuse from said shafts upon said surface in the usual way as is done in operating coal mines; and they shall have the

right to dump the waste from the main shaft on the surface, as is done in operating coal mines." The defendants are "to have the right of way over the surface of said land for railway track to shaft, not exceeding 50 feet in width, and also the right of way, not exceeding 150 feet in width, for switches and dump buildings, and any necessary buildings for the operation of said mine at said mine. They are to have sufficient ground to properly operate said mine in the usual manner in which coal mines are operated. That for said right of way and switch grounds they are to pay 20 dollars per year on the 1st of January of each year." With reference to such rental for right of way it is stipulated that, "if the second party desires to use the right of way upon the land after the coal has been exhausted from first parties' land, they may continue to do so at a rental of \$20 per year during the continuance of the use, to be paid on or before the 1st day of January of each year." The first party "reserves the surface, except as herein granted, and the right to farm the same, or use it in any manner that he desires, subject to the rights herein granted." It is to be noticed that the lease is "for the purpose of mining coal." Nowhere in the lease is there any language used involving an express limitation of the use to the mining of coal from the land itself. It appears, therefore, that the situation of the parties at the time of making the lease was this: That plaintiffs had an 80-acre tract of land at least partially underlaid with coal, which they desired to have removed on payment of royalty. The removal of this coal would involve the construction of shafts, of underground entries, and of some sort of track on the surface by which the coal could be taken away from the mouth of the shafts; also the dumping on the surface of refuse. The reservation of the surface for agricultural purposes would indicate that the plaintiffs attached some importance to the occupancy of the surface, and in harmony with this idea it is stipulated that for right of way over the sur-

face the defendants are to pay the additional rental of \$20 per year. It may be that, without other provision in the lease, it ought to be construed as relating entirely to the removal of coal from the plaintiffs' land, although no such express limitation is specified; but the parties went further, and expressly provided that the second party might use the right of way upon the land after the coal had been exhausted from the land in question, the rental for the use of the surface right of way being continued during such additional use. What could have been the object of this provision if no coal was to be taken from the shaft on plaintiffs' land except the coal from the land itself? Plaintiffs' counsel has not suggested any occasion possibly arising from the taking of coal from plaintiffs' land which would require the use of this right of way after such coal should be exhausted. The parties must, therefore, have contemplated some use for the shaft and the right of way other than the use for the removal of plaintiffs' coal, and it is reasonable to suppose that the parties considered that the continued use of this shaft for the removal of other coal, and the transportation of it over plaintiffs' land, would be sufficiently compensated by the payment of the yearly rental of \$20 for the surface right of way while defendants continued to use it. The plaintiffs may very well have considered that such an annual rental for the use of the surface right of way would adequately compensate them for all damages which they would suffer in view of the fact that the surface of the land was suitable for agricultural purposes only, and as to such purposes the continued use of the underground entries for the removal of other coal would be no detriment whatever. It appears from the evidence of John Madison, one of the plaintiffs, who, by the way, had had, at the time this contract was made, long experience in coal mining, that plaintiffs were to receive a considerably greater royalty for the coal removed from their land than was paid by defendants for coal from adjoining land which was leased

from other owners at about the same time; and plaintiffs may well have thought that, on the whole, they would be sufficiently compensated for all the use which defendants could make of the land in question. The only possible inconsistency which we find in the lease is that the minimum royalty is to "continue as long as said mine is operated, not to exceed 25 years, but, if the coal is sooner mined out, then the royalty shall cease when the coal is exhausted"; whereas the surface right is to continue after the coal is exhausted. But, taking these two provisions together, it is clearly the intention that, after the coal is exhausted, and the payment of the minimum royalty ceases, the defendants are still to have the use of the surface right of way, and, as we think, impliedly, the use of the underground entries and shafts, at a rental of \$20 per year, at least, to the end of the period of 25 years. It appears that the coal on plaintiffs' land is not yet exhausted, and that defendants are still paying at least the minimum royalty per year, and we are not now called on to decide what the situation will be during the balance of the 25 years after plaintiffs' coal is exhausted, nor whether the defendants will have the right to use the underground entries, shafts, and surface right of way after the expiration of the 25 years on the payment of the annual rental of \$20. Appellants contend that, in any event, there is nothing in the lease authorizing the use of the entries, shafts, and surface right of way for the removal of coal from other lands until plaintiffs' coal is exhausted; but, in view of the fact that, as we hold, the lease does imply the right to remove other coal through and over plaintiffs' land at some time during the continuance of the lease, then the privilege must have been contemplated as vesting from the beginning of the lease; and we see no reason why that privilege need have been expressly stipulated for, in view of the general provision that defendants were to use the land for the purpose of mining coal, without restriction, and that it was expressly stipulated

that at least the minimum royalty should be paid to plaintiffs during each year until plaintiffs' coal is exhausted. It is urged for plaintiffs that defendants are under obligations to use reasonable diligence in getting out plaintiffs' coal, but the question whether defendants have used such diligence is not in controversy in the case. No damage is claimed on the ground that defendants have not taken the coal from plaintiffs' land with reasonable diligence. We reach the conclusion, therefore, that under the contract defendants had the right to use plaintiffs' land in the manner stipulated in the lease, not only for the purpose of removing coal from plaintiffs' land, but also for the removal of coal from adjoining land, and that plaintiffs are not entitled to recover for such additional use any other compensation than that provided for in the lease.

II. Defendants rely also upon the result of an action brought in 1891, which they insist concludes plaintiffs with reference to the construction of the contract which plaintiffs insist upon in this case. In the former action plaintiffs alleged, among other things, that by the terms of the lease there was "no agreement, either expressed or implied, whereby the defendants have the right to mine coal from other lands, and haul the coal through the entries on the plaintiffs' land, and dump the waste upon plaintiffs' land"; that defendants then were, and had been for some time, hauling coal from other land through the entries on plaintiffs' land, and throwing the waste upon the plaintiffs' land, and that defendants were projecting and running other entries into other lands with the intent of mining coal from under other lands; that, when defendants entered into said lease, they entered into no arrangements or agreements with plaintiffs that they intended or desired to use the underground roadways commonly known as "entries" for the purpose of hauling coal, slack, and other débris from other mines and dump the said waste upon plaintiffs' land; that these

acts were with the intent to unload the waste and débris upon plaintiffs' land, thereby injuring the plaintiffs greatly; that the resulting damage to plaintiffs was an irreparable injury; that plaintiffs had no remedy therefor, either at law or in equity, to recover damage from the defendants, and that plaintiffs were remediless, both at law and in equity, if the defendants were permitted to haul coal from other lands through the entries on plaintiffs' land; that by the lease in question plaintiffs at no time, or under no circumstances, intended that defendants should have any other or greater rights in the premises save and except a right to mine the coal therefrom, and to use a sufficient amount of the surface thereof for the purpose of properly mining the said coal; and that the right to operate a mine on said land and mine coal from other land, using plaintiffs' land for underground railways and as a place upon which to dump waste, was not intended nor granted by the plaintiffs; and the prayer of plaintiffs was that defendants be enjoined from hauling coal through the entries on plaintiffs' land from other lands than the plaintiffs', and from dumping waste and débris from other lands upon the plaintiffs' land, and from operating said coal mines other than the coal mines of the plaintiffs. There were other allegations of wrong on the part of defendants, and other demands for relief, which are not here material.

Defendants' answer admitted the lease, and admitted that defendants were working coal upon other lands than those of plaintiffs, and admitted that they intended to do so, and alleged that they had the right to do these acts under the contract as understood and contemplated by the parties thereto; also that plaintiffs were not without adequate remedy at law, and asked that plaintiffs' petition be dismissed on the merits, and that defendants have judgment for costs. The decree of the court recited that, "the evidence of all parties having been introduced, and the court, having been fully advised in the premises, finds, and it so orders, that the plaintiffs' peti-

tion be dismissed on its merits," and judgment was rendered for defendants for costs.

It appears that in the same action defendants introduced a cross bill asking the reformation of the contract so as to make it show that defendants were entitled to the rights claimed by them under the lease. This cross bill was dismissed, but, in view of the adjudication on the petition and answer, it is plain that affirmative relief to defendants was unnecessary, and that the dismissal of the cross bill was not an adjudication that defendants did not have, under the contract as it existed, the rights which they claimed in their answer. Now, with reference to this adjudication, it is claimed by appellants that it might have been made on the ground that plaintiffs had an adequate remedy at law, but this contention is not tenable. Such an objection, if valid at all, would have been one appearing on the face of plaintiffs' bill, and might have been raised by demurrer; and, even though raised by answer, it would not go to the merits of the case, whereas the decree of the court was that plaintiff's bill be dismissed on its merits. It is provided by Code, § 3771, that the judgment must, if it is rendered on matter in abatement, and not on the merits, so declare"; and under this section it has been held that, if the record does not disclose that the suit was determined upon a plea of abatement, it is presumed that the judgment was rendered upon a defense that would constitute a bar to the action. *Garretson v. Ferrall*, 92 Iowa, 728, 61 N. W. 251. We fully recognize the rule that a former adjudication, when pleaded in a case founded on a different cause of action, must be shown to have involved the very question at issue in the case in which the adjudication is pleaded. *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. 55; *Hanna v. Read*, 102 Ill. 596; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Foye v. Patch*, 132 Mass. 105; 2 Black, Judgm. 506. But some of these cases are also direct adjudications

to the effect that, although the subject-matter of the second suit may be different from that of the first, yet, if the suits are between the same parties, the adjudication of any particular question involved in the first suit will be conclusive in the second. In this former suit the question was distinctly presented on the record, and submitted to the court for determination, whether, under the lease, defendants were entitled to use the entries, shafts, and right of way on plaintiffs' land for the purpose of removing coal from adjoining lands. If defendants had not this right under the lease, then the plaintiffs were entitled to an injunction restraining defendants from a use of plaintiffs' lands not authorized by the lease. *Kraft v. Welch*, 112 Iowa, 695. The denial to plaintiffs of any relief was an adjudication that defendants' contention as to their rights under the lease was well founded. Exactly the same question with reference to the rights of defendants under this lease is presented in the case now before us, and we must hold that the prior adjudication constitutes a bar to plaintiffs' present cause of action. As supporting our conclusion, see *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; *Newby v. Caldwell*, 54 Iowa, 102, 6 N. W. 154; *Whitaker v. Johnson County*, 12 Iowa, 595; *Hodge v. Shaw*, 85 Iowa, 137, 52 N. W. 8; *Keokuk Gaslight & Coke Co. v. City of Keokuk*, 80 Iowa, 137, 45 N. W. 555; *Hunter v. Railway Co.*, 76 Iowa, 490, 41 N. W. 305; *Bissell v. Spring Valley Tp.*, 124 U. S. 225; *Thorn v. Newsom*, 64 Tex. 161, 53 Am. Rep. 747. Therefore the prior adjudication is a complete bar to plaintiffs' action, and, without regard to such defense, plaintiffs are not entitled to recover under the terms of the lease.

Affirmed.

LADD, J. It is quite enough that this contract has been once construed, and, as the former adjudication is conclusive,

and may not be questioned in this action, the first portion of the opinion is superfluous, and involves the evident inconsistency of deciding what is held to have been fully adjudicated in another action. I concur in the conclusions reached in the second portion of the opinion only.

BUTTE HARDWARE CO. v. HENRY L. FRANK ET AL.

(25 Montana 344; 65 Pac. 1. Supreme Court. May 27, 1901.)

Lien on possessory claim. An unpatented mining claim being real estate, a judgment lien attaches to it, under Code of Civil Procedure, Sec. 1197, declaring that from the time a judgment is docketed it becomes a lien on all real property of the judgment debtor.

Transfer, no abandonment. A judgment lien on an unpatented mining claim is not lost by the transfer in writing of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer in writing of an unpatented claim does not amount to an abandonment.

Lien attaches to patented title. The holder of a lien is not obliged to adverse but after Sheriff's Deed delivered the lien is gone and the holder of the title so transferred must protect it by adverse.

A quit-claim deed implies a doubtful title in the grantor.

Facts of the case. Defective allegation of title. A complaint alleged that plaintiff had a docketed judgment against R., and that certain unpatented mining claims were conveyed by deed absolute from D. to R. who on the same day gave a quit-claim deed to F., and that the property was sold to plaintiff at judgment sale. F. was in the possession of the property at the time the quit-claim deed was made. *Held*, that there being neither an allegation that R. ever owned any of the property, nor that F. ever got any property or title from him, and there being an implication of doubt as to the title from R., owing to his having given a quit-claim deed to one in possession, the complaint was insufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title to the claims.

Wrong reason for right ruling. If the act of the trial court in sustaining a demurrer was right, such act must, on appeal, be sustained, notwithstanding the trial court in sustaining the demurrer may have given a wrong reason.

Silence of counsel is not necessarily a restriction on the power of the court to adjudicate upon defects found by the court.

Appeal from District Court, Silver Bow County; JOHN LINDSAY, Judge.

¹A constable's sale of a possessory claim pending application for patent does not divest the title of the applicant. *Hamilton v. S. Nevada Co.* 15 M. R. 314.

Suit by the Butte Hardware Company against Henry L. Frank and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

F. T. McBRIDE and BERNARD NOON, for appellant.

CAMPBELL & PARR, for respondents.

MILBURN, J. This case comes before this court upon the appeal of the plaintiff from a judgment entered after the sustaining of a demurrer to a complaint, the ground of said demurrer being that the pleading did not state facts sufficient to constitute a cause of action. The plaintiff abided his complaint, and a judgment was entered for the defendants.

Appellant declares that the questions raised by respondents in the lower court are: First, "Does the lien of a judgment attach to an unpatented mining claim under the statutes of Montana, which provide that a judgment becomes a lien upon all the real property of the defendant from the time of the docketing thereof?" and, second, "If it does, is such a lien an adverse claim, within the meaning of the United States statutes providing for the filing of adverse claims in the land office against one seeking a patent for a mining claim on the public domain?" Counsel for the respondents in their brief declare that they do not consider either of the foregoing questions of importance in the case, and therefore refrain from discussing them. They hold that the question to be considered by this court is, "Does a judgment rendered against a locator or a holder of a possessory title to an unpatented mining claim attach to the governmental title, where the locator has only the right to purchase from the government of the United States upon certain conditions, where he has failed to exercise that right, and has abandoned the same by conveying his possessory right to another?"

The complaint sets up that the plaintiff is a corporation organized under the laws of the state of Montana; that a judgment was duly procured and entered in the district court of Silver Bow county in favor of the plaintiff on September 6, 1890, in the sum of \$922.02 with costs, against the firm of Gordon & Ritchie, composed of John A. Gordon and Frederick Ritchie, said judgment having been duly docketed on September 17, 1890; that on May 18, 1895, a writ of execution was issued and the sheriff levied on certain lands described in the complaint, said lands being levied upon as the lands of the said Ritchie; that on the 10th day of June, 1895, the sheriff sold all right, title, and interest of the said defendant in said lands; that the plaintiff was the highest bidder, and became the purchaser thereof; that a certificate of sale was executed and delivered by the sheriff to the plaintiff, and was duly recorded in the office of the clerk of Silver Bow county; that there was no redemption, and the sheriff executed and delivered to the plaintiff (it being still the owner of the said certificate) on July 30, 1896, a deed of conveyance of the premises in question; that said property consisted of an undivided one-half interest in the John the Baptist lode, an undivided one-half interest in the Silver Moon lode, all of the Evangelist lode, all of the Mascot lode, all of the Copper Trust lode, and an undivided one-sixth interest in the Eddie lode, situate in said county; that after the docketing of the judgment one Paul A. Davis "conveyed by deed absolute to the defendant Frederick Ritchie the herein-described premises on May 21, 1891, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining"; that "thereafter towit, on the 21st day of May, 1891, the said defendant Frederick Ritchie conveyed by quitclaim deed all his right, title, and interest to the above-described premises to the defendant herein, Henry L. Frank"; that at the time of the purchase of said premises by the said Ritchie, and the

transfer by him to Frank, the same were unpatented mining claims; "that thereafter, and while the lien of this plaintiff's judgment hereinbefore alleged was still a valid and subsisting lien upon said premises, the defendant herein, Henry L. Frank, secured patents from the United States government for said unpatented mining claims as follows, to wit: Evangelist, August 19, 1893; Mascot, August 19, 1893; John the Baptist, August 19, 1893; Silver Moon, December 21, 1893; Eddie, February 21, 1895; Copper Trust, August 19, 1893."

The complaint further states that on October 23, 1896, the defendant Frank conveyed by quitclaim deed a certain interest in the Copper Trust claim (describing it) to the defendant John S. Clapp; that on the same day said Frank conveyed to F. H. Symons, by quitclaim deed, all his interest in and to a certain portion of the surface ground of the Copper Trust claim (describing it); that "defendants herein, Henry L. Frank, John S. Clapp and F. H. Symons, are, and have been at all times hereinbefore mentioned, in connection with said defendants, in possession of and control of the heretofore described premises; that they claim the same adversely, and withhold the same wrongfully and unlawfully and illegally from this plaintiff; that the said claims of the said defendants are adverse to the rights of this plaintiff, and operate as a cloud upon the title of plaintiff, which, unless removed and possession given to plaintiff, will in time ripen into title by adverse possession"; that plaintiff at all times "since the execution of the said sheriff's deed to plaintiff on the 30th day of July, 1896, has been the sole and unconditional owner in fee simple of the said premises herein described, and entitled to the use, benefit, and enjoyment of the same, and that it has never parted with the same or any portion thereof"; that the defendants claim title to said premises by reason of said patents secured by the defendant Henry L. Frank, and the conveyances of Frank to the defendants Clapp and Symons; that defendants further claim that plain-

tiff is forever barred and estopped from claiming or asserting any right, title, or interest in or to the said premises, by reason of its failure to file any adverse claim to the application of said Henry L. Frank for a patent to the premises at the time he secured the said patents; that plaintiff claims title to the said premises by reason of the sale and the execution of the sheriff's deed as aforesaid; that on May 21, 1891, said judgment became and was a lien upon said property; that the lien of its judgment was preserved by section 2332, Rev. St. U. S.; and that plaintiff was not required to assert an adverse claim against the alleged application of Frank for a patent. Plaintiff prays that the lien of said judgment may be adjudged and decreed as a valid and subsisting lien upon the property in controversy at the time of said sale, that the sheriff's deed be declared to have passed the title in fee to said premises, that plaintiff be declared the sole owner as against the said defendants, and that the claims of the defendants be declared to be void as to the plaintiff. Plaintiff further prays that it be awarded the possession of the premises free from all claims and demands of the defendants, or those claiming under them, and for further relief. The demurrer was submitted without argument.

The question of whether a judgment lien attaches to an unpatented mining claim is new to this jurisdiction, and is not devoid of difficulty. Section 1197 of the Code of Civil Procedure provides that, "immediately after filing the judgment roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied." Is an unpatented mining claim real prop-

erty of the owner? This question must be answered in the affirmative. There is no need to argue the point, as it seems to be settled by authority that unpatented mining claims are real estate. *Robertson v. Smith*, 1 Mont. 410; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280; *Tibbits v. Ah Tong*, 4 Mont. 536, 2 Pac. 759. They are property in the fullest sense of the word. They may be sold, transferred, mortgaged, and inherited without infringing the title of the government. They may be sold to enforce a lien for taxes. *Forbes v. Gracey*, 94 U. S. 762; *State v. Second Judicial Dist. Ct.*, 24 Mont. 330, 61 Pac. 882. We cannot do else, in the light of authority, than hold that unpatented mining claims are real estate, and that therefore a judgment duly docketed as provided in section 1197, *supra*, is a lien upon them, with all other real estate belonging to the judgment debtor.

The point is raised by respondents that a judgment, if a lien, would not be such after sale of the mining claim,—he giving up possession to the vendee,—for the reason that such sale would be an abandonment, and all his rights would be gone, and the lien with them. In support of this position counsel cite *Murley v. Ennis*, 2 Colo. 300, which declares that title by location may be lost by abandonment, and that if, without writing, he yield up the possession to another, “the right of the first occupant is gone by abandonment, and by virtue of his occupancy a new right has arisen in him who succeeds.” It is to be noted that the transfer is said to be abandonment if made without writing. The alleged transfer from Ritchie to Frank was in writing, hence the authority does not fit the averment of the complaint. Respondents also cite *Derry v. Ross*, 5 Colo. 295, but we find nothing in that case to support the contention that a conveyance to another works an abandonment; for the court holds that mining claims are “rights which may be divested by sale, gift, or

abandonment." This language is very far from a statement that a sale is an abandonment, but is very strong in its implication that it is not.

Section 2332, Rev. St. U. S., clearly contemplates the buying and selling of mining claims, as it provides that, upon application for patent, evidence may be offered to show the possession of and work done by the applicant's grantors. It would be absurd to permit sales for the benefit of the vendees, and then declare such sales proof of abandonment of all rights of the grantor.

Should a judgment creditor adverse the application of the judgment debtor or his grantee for a patent? We think that there is neither law nor logic suggesting such a thing. In *Hamilton v. Mining Co.*, 33 Fed. 562, 13 Sawy. 113, 117, it was held that the interest obtained by a purchaser at a constable's sale prior to the time of expiration of the publication of notice is an adverse claim, which, unless filed as the law requires, is waived; but the very reason given for this is the reason why a lienor, merely, cannot adverse. The purchaser at the execution sale has stepped into the shoes of the judgment debtor, the owner of the claim; and if the sale be valid he can go on to perform the work and other things necessary to be done, pay the purchase money, contest the rights of other claimants, and procure the title from the government, which does not pass by virtue of the officer's deed. Such deed from such officer, selling on execution, passes only the present interest, and not an after-acquired title, and can only have the effect of a quitclaim deed in its strictest sense. Hence, if he have such deed, he must adverse. If he have merely a judgment lien on all the realty of the debtor, he cannot adverse, because he is not yet in the place of the debtor, and, further, because the lien continuing will be a lien on the realty of the debtor after as well as before patent,—no more, no less. In case of a special lien, such as a mortgage, the lienor need not adverse the debtor's claim to

a patent, as the patent will inure to his benefit. Lindl. Mines, 719. The same reason will, we think, apply to a judgment lien, and further, such lien, doubtless, is included within the provisions of section 2332, Rev. St. U. S., which declares that nothing in the chapter of the Revised Statutes which relates to the location, holding, and procuring title to mining claims and to adverse claims, etc., shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of the patent. After execution levied and officer's deed made and delivered, the purchaser should adverse, because the lien is gone as a lien. Before such deed made and delivered, no adverse claim may be made.

We come now to the consideration of the point made by respondents' counsel: "Does a judgment rendered against a locator or a holder of a possessory title to an unpatented mining claim attach to the government's title, where the locator only has the right to purchase from the government of the United States upon certain conditions, where he has failed to exercise that right, and has abandoned the same by conveying his possessory right to another?" This question is *petitio principii*. It begs the question, for that it assumes that conveying one's possessory rights is abandonment, which, as we have heretofore shown, is not the case.

The question in this cause is this: Did Ritchie own and convey valid mining claims to Frank by his quitclaim deed, and did Frank prove up on those claims so conveyed to him, and get patents therefor; his right to patents depending, in whole or in part, upon any rights of Ritchie actually conveyed to him by said quitclaim deed? If he did, he bought and took the claims with all the disabilities of the grantor attaching thereto; that is, he bought real estate from the owner, against whom there was a valid, docketed, and existing judgment in the district court, and the patent would inure to the benefit of the judgment creditor, and the sheriff's

deed, after execution sale, would convey title to the purchaser.

But does the complaint state facts showing such a case as last referred to? The counsel for plaintiff proceeds upon the theory that Ritchie was the owner of said claims; that Frank took title from Ritchie; that Frank had patented certain mining claims located by Ritchie or some predecessor of his, his right to patents depending upon the acts of Ritchie and his predecessor; and that plaintiff is the owner by and through the sheriff's deed.

The amended complaint does not thus state. It does not reasonably imply that these alleged facts are true. The statement that Davis conveyed by "deed absolute" to Ritchie, and that Ritchie conveyed all his interest by quitclaim deed to Frank, is not a statement that Davis or Ritchie owned the property or any interest therein, or even located or represented it or any part thereof. The deed of Davis might estop him from denying that he had sold the property to Ritchie, but he is not a party to this action. Certainly an admission by Frank, if such should be made, that Davis made a deed of conveyance—a "deed absolute"—to Ritchie, and that Ritchie made a quitclaim deed to him (Frank) would not be an admission that Davis was the owner when he conveyed to Ritchie, or that Ritchie owned said property when he (Ritchie) made the quitclaim deed. A quitclaim deed implies a doubtful title in the grantor, and, such being its character, it should not be held to pass anything more than a doubtful title. 9 Am. & Eng. Enc. Law, 106, note; *Kerr v. Freeman*, 33 Miss. 292; *Emmel v. Headlee* (Mo.), 7 S. W. 22. In *Anderson v. Boom Co.*, 57 Mich. 216, 23 N. W. 776, it was held that a quitclaim deed from a party not shown to have been in possession at the time it was executed is no evidence of a title,—much less when the party claiming under the deed was already in possession of the land at the time that the deed was given. There is nothing in the

amended complaint in the case before us to show that Ritchie—or, Davis even—was ever in possession; but there is a statement in the amended complaint that Frank was in possession and control of said claims at the dates connected with him in said amended complaint, and the date of the quitclaim deed (May 21, 1891) certainly relates to him as well as to the grantor, so that he must have been in possession and control of the property when the quitclaim deed was made, so that, as said in *Anderson v. Boom Co.*, *supra*, the quitclaim deed was no evidence of title conveyed to Frank.

It cannot be held that in Montana an after-acquired title relates back to a quitclaim, and passes to the grantor in it, if the grantor had no equitable title at the date of the quitclaim deed. How, then, can it be reasonably inferred that, if Frank got a patent, it inured to the benefit of Ritchie's judgment creditor, when it would not even presumptively appear that, if it were in the amended complaint alleged that a patent for the land had been issued to Ritchie, it would convey the title to Frank? There is no allegation or presumption that Ritchie had the legal or equitable title at the date of the quitclaim deed.

To conclude as to this point, there is neither an allegation that Ritchie ever owned any property on which the judgment was a lien, nor an allegation that Frank ever got any property or title from, by, or through him; but, on the contrary, there is implication of doubt as to his title from Ritchie. To allege that Frank took a quitclaim deed while he was in possession and control of the property does not reasonably rebut the idea that he owned the claim as a locator or as assignee of some locator (not Ritchie), and that he procured a patent upon such ownership. It is not unreasonable to conclude from the amended complaint that Frank, in order to prevent the annoyance of a contest in the United States land office, procured such quitclaim deed. The allegation of plaintiff's ownership ever since the sale by the sheriff is no

more than a statement that it owns whatever property was actually acquired by and through such sale, whereas, as we have seen, there is no averment that Ritchie had ever any to sell either to Frank or through the sheriff. It must clearly appear from the complaint that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter of the action as will authorize him to bring a suit concerning it. Failing in this, a general demurrer to the bill for want of equity will lie. 6 Enc. Pl. & Prac. 400, and cases cited.

Where a seasonable attack is made upon the complaint for want of substantive allegations, the court should indulge, as against the pleader, the presumption that he has stated his case as strongly as he can. *Conrad Nat. Bank. v. Great Northern Ry.*, 24 Mont. 178, 61 Pac. 1.

The amended complaint does not state facts sufficient to warrant the court in affording relief. The demurrer having been submitted without argument, we cannot tell upon what ground the court sustained it; and it does not seem that counsel are agreed upon the points upon which the controversy turned, or upon which it is before us on appeal.

Counsel seem to assume in their brief that certain averments therein are contained in the complaint; that is, allegations setting up that Frank got the property from Ritchie, —proved up and got his patents by and through Ritchie's quitclaim deed, and title conveyed thereby. But there are no such averments. This case is before this court on appeal from the judgment, which judgment was, on demurrer, sustained to the amended complaint, for want of substance; plaintiff abiding its complaint. The court was right in its decision on the demurrer. The judgment is right, and must be sustained. The court may have, in sustaining the demurrer, done so for a wrong reason, but we have nothing to do with its reasons. Our duty is to pass upon the correctness of its action. If the act of the court in sustaining the

demurrer was right, the court must be sustained. Hayne, New Trials & App. p. 839.

The silence of counsel as to the defects found by this court in the said complaint cannot in such a case as this be regarded as a restriction upon the legal scope of the general objection raised by the demurrer. The judgment is affirmed.

Affirmed.

BRANTLY, C. J., I concur.

PICOTT, J. (dissenting). I concur with the majority of the court in holding that an unpatented mining claim is real property, subject to the lien of a docketed judgment; that the holder of such a lien is not an adverse claimant, within the meaning of congressional legislation; and that the conveyance of an unpatented mining claim is not an abandonment. The complaint is, I think, defective in the particulars adverted to in the opinion; and, if they had been pointed out or even suggested in this court, I should not hesitate to concur in the judgment of affirmance. But neither party has suggested that the complaint is wanting in substance because the allegations which this court deems necessary have been omitted therefrom. In their briefs and arguments counsel do not intimate that the complaint is insufficient for want of the averments mentioned. On the contrary, all the arguments are devoted to the question whether the complaint in other respects fails to state facts sufficient to constitute a cause of action. So far as the present appeal is concerned, this court should, I think, examine the complaint for the purpose of determining whether it is obnoxious to the specific objections urged, and should not affirm the judgment below upon a point not made, but practically waived, in this court. It would be eminently just and proper in reversing the judgment to call attention to the seeming defect, so that upon re-

mand appropriate steps might be taken; the complaint being susceptible of amendment according to the facts. But the complaint is now held to be insufficient, and the judgment is affirmed, because of a defect not relied upon by the respondents. It is true that in *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46, a complaint was declared to be insufficient upon a ground not specifically relied on by the defendants; but that was a very different case from the one at bar, and there the judgment was reversed and a new trial ordered on appeal by the defendants, thereby affording an opportunity for amendment.

I am therefore constrained to dissent from the judgment of affirmance.

CALHOUN GOLD MINING CO. v. AJAX GOLD MINING CO.

(182 U. S. 499; 21 Sup. Ct. 885. Supreme Court. May 27, 1901.)

The local construction of a federal statute cannot make a rule of property. Its meaning must be established by the construction of the Federal Supreme Court.

Cross Lodes. The servitude imposed upon the senior location of a mining claim by U. S. Rev. Stat. § 2336, by giving a right of way to the junior location, whether that extends only through the space of the intersection of the veins or through the space of intersection of the claims, does not otherwise affect the exclusive rights given the senior location, or except therefrom the cross veins apexing therein.

Blind veins underneath prior lode claims belong to the surface location under U. S. Rev. Stat. § 2322, and their discovery by running a tunnel, under § 2323, does not give the owner of the tunnel any right to them.

The location of a tunnel site for mining purposes must be made in subordination to prior lode claims, and the tunnel has no right of way through them.

A patent is proof of discovery and cannot be collaterally attacked by evidence that at the date of the subsequent location of a tunnel site no ore had been discovered in the lode claim.

Error to the Supreme Court of the State of Colorado to review a decision affirming a judgment in an action for trespass on mining claims. **Affirmed.**

¹Held not to apply to tunnel rights which had been initiated before the entry but were not in position to adverse the application or prevent the entry of the patent and defendant allowed to prove no discovery in plaintiff's patented claim. *Uinta Co. v. Creede Co.* 119 Fed. 164; 22 M. R. —.

Patent is conclusive evidence of validity of the location notice. *Chambers v. Jones*, 17 Mont. 156; 42 Pac. 758.

Regularly issued is conclusive as to extralateral as well as surface rights. *Empire Co. v. Bunker H. Co.* 114 Fed. 420; 22 M. R. —.

Unsuccessful effort to set aside on the ground that \$500 improvements had not been done and no discovery. *U. S. v. King*, 83 Fed. 188.

See same case below, 27 Colo. 1; 20 M. R. 192.

The facts are stated in the opinion.

W. E. So RELLE, for plaintiff in error.

JOSEPH C. HELM, ERNEST A. COLBURN, and CHARLES H. DUDLEY, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court:

This action was brought in one of the district courts of the state of Colorado by the defendant in error to recover damages from plaintiff in error for certain trespasses on, and to restrain it from removing ore from ground claimed to be within the boundaries of, the mining claims of defendant in error. The answer of plaintiff in error justified the trespasses and asserted a right to the ore by reason of the ownership of another mining claim and the ownership of a certain tunnel site.

The rights of the parties are based on, and their determination hence involves the construction of, the following sections of the Revised Statutes of the United States, empowering the location of mining claims:

When it issues after a supposed determination of mineral character it is conclusive on that point. *Gale v. Best*, 17 M. R. 186.

Patent is conclusive evidence of valid discovery and location and that the required expenditure had been made. *Carson City Co. v. N. Star Co.* 19 M. R. 118.

All presumptions are in favor of the validity of the patent. *U. S. v. Marshall Co.* 16 M. R. 205. *U. S. v. Iron Silver Co.* 128 U. S. 673.

Owner applying for patent on part of his claim including the discovery shaft does not abandon the remainder of the claim. *Milner v. Hamley*, 31 Colo. 495; 74 Pac. 980.

The monuments control a false tie line. *Galbraith v. Shasta Co.* 143 Cal. 94; 76 Pac. 901.

All essential preliminaries to patent are conclusively presumed in its favor. *Id.*

"Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

"Sec. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

"Sec. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

The especial controversy is whether rights conferred by §

2322, are subject to the right of way expressed in § 2323, and limited by § 2336. Or, in other words, as to the latter section, whether by giving to the oldest or prior location, where veins unite, "all ore or mineral contained within the space of intersection," and "the vein below the point of union," the prior location takes no more, notwithstanding that § 2322 gives to such prior location "the exclusive right of possession and enjoyment of all the surface included within the lines" of the location, "and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error denied such effect to §§ 2323 and 2336, and brought this suit, as we have said, against plaintiff in error for damages and to restrain plaintiff in error from removing ore claimed to be within the boundaries of the claims of defendant in error, to which ore defendant in error claimed to be entitled by virtue of § 2322. The judgment of the lower court sustained the claim of the defendant in error, and damages were awarded it, and the plaintiff in error was enjoined from further prosecuting work. An appeal was taken to the supreme court of the state, and the judgment was affirmed. Thereupon this writ of error was allowed.

The annexed plat¹ exhibits the relative location of the respective properties of the parties. The Champion location was dropped from the case. There is no controversy as to the validity of the respective locations, none as to the tunnel site or of the steps necessary to preserve it. Indeed, the facts are all stipulated, and that the respective locations are evidenced by patents, the defendant in error being the owner of the Monarch and the Mammoth Pearl, and the plaintiff

¹Same plat as in the case below, 20 M. R. 195.

in error the owner of the Victor Consolidated and the tunnel site. The facts are stated by the supreme court of the state as follows:

"That each of appellee's claims was located prior to either the lode claim or tunnel site of appellant; that the receiver's receipt on each of the claims of appellee issued prior to the location of the tunnel site and prior to the issuance of receiver's receipt on the Victor Consolidated; that the patents upon the lode claims of appellee issued prior to the patent on the lode claim of appellant; that the patent to the apex issued prior to the location of the tunnel site and on the Mammoth Pearl and Monarch subsequent to such location; that the vein of the Victor Consolidated was discovered and located from the surface, was not known to exist prior to such discovery, extends throughout the entire length of that claim, and on its strike crosses each of the veins in the claims of appellee upon which they were respectively discovered and located; that the tunnel cuts numerous blind veins underneath the surface of the claims of appellee, which do not appear upon the surface and were not known to exist prior to the location of the tunnel; that the vein of the Victor Consolidated was cut in this tunnel underneath the claims of appellee and ore of the value of \$400 removed therefrom. It also appears that the patents upon the lode claims of appellee embrace the conflict with the Victor Consolidated without any reservation as to either surface or veins, and in this respect conform to the receiver's receipts upon such claims; that the patent on the Victor Consolidated excludes the surface in conflict with the claims of appellee and all veins having their apex within such conflict, which are the same exceptions contained in the receiver's receipt for that claim; that the portal to the Ithaca tunnel site was at the date of its location on public domain; that work thereon was prosecuted diligently, and that the location of such tunnel was in all respects regular; that all necessary steps were taken by appellant to locate the blind veins cut in such tunnel, which are in controversy in this case; that the record titles of the claims of appellee are vested in it, and the record titles of the Victor Consolidated, the Ithaca tunnel site, and blind veins discovered therein underneath the claims of appellee, are vested in appellant. The record discloses that appellant offered testimony tending to prove that at the date of the location of its tunnel site mineral in place had not been discovered on the Monarch and Mammoth Pearl lode claims."

The assignments of error present the following proposi-

tions, which it is stipulated the case involves and to which the decision may be directed:

"First. Whether or not the Ithaca tunnel (the tunnel claimed by plaintiff in error) is entitled to a right of way through defendant in error's lode claims.

"Second. Whether or not plaintiff in error has acquired by virtue of said tunnel-site location the ownership and right to the possession of the blind veins cut therein, towit, veins or lodes not appearing on the surface, and not known to exist prior to the date of location of said tunnel site.

"Third. Whether or not plaintiff in error is the owner and entitled to the ore contained in the vein of its Victor Consolidated claim, within the surface boundaries and across lode claims of defendant in error.

"Fourth. Whether or not plaintiff in error should have been allowed to introduce evidence for the purpose of showing that there was no discovery of mineral in place on the Monarch and Mammoth Pearl claims of defendant in error prior to the location of said tunnel site."

The third proposition involves the relation of §§ 2322 and 2336. It is first discussed by plaintiff in error, and is given the most prominence in the argument, and we therefore give it precedence in the order of discussion. It presents for the first time in this court the rights of a junior location of a cross vein within the side lines of a senior location under § 2336. Prior to the decision by the supreme court of Colorado in the case at bar that court had decided that the junior location was entitled to all of the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. *Branagan v. Dulaney* (1885), 8 Colo. 408, 8 Pac. 669; *Lee v. Stahl* (1886), 9 Colo. 208, 11 Pac. 77; *Morgenson v. Middlesex M. & M. Co.* (1887), 11 Colo. 176, 17 Pac. 513; *Lee v. Stahl*, 13 Colo. 174, 22 Pac. 436. In *Coffee v. Emigh* (1890), 15 Colo. 184, 23 Pac. 83, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is con-

tended that the rule laid down by them became a rule of property in the state, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it "had reason to believe was a vested right in the Victor Consolidated vein."

There are serious objections to accepting that consequence as determinative of our judgment. We might by doing so confirm titles in Colorado, but we might disturb them elsewhere. The statute construed is a Federal one, being a law, not only for Colorado, but for all of the mining states, and, therefore, a rule for all, not a rule for one, must be declared. Besides, what consideration should have been given to prior cases, the supreme court of the state was better able to judge than we are. It may be that the repose of titles in the state was best effected by the reversal of the prior cases. At any rate, a Federal statute has more than a local application, and until construed by this court cannot be said to have an established meaning. The necessity of this is illustrated, if it need illustration, from the different view taken of §§ 2322 and 2336 in California, Arizona, and Montana, from that taken in the prior Colorado cases. The supreme courts respectively of those states and that territory have adjudged a superiority of right to the cross veins to be in the senior location. Manifestly, on account of this difference, if for no other, this court must interpret the sections independently of local considerations. And in doing so we do not find in the sections much ambiguity so far as the issue raised by the record is concerned; indeed, not even much necessity for explanation. Section 2336 does not conflict with § 2322, but supplements it. Section 2336 imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the supreme courts of Cal-

ifornia, Arizona, and Montana, or through the space of intersection of the claims, as held by the supreme court of Colorado in the case at bar. It is not necessary to determine between these views. One of them is certainly correct, and therefore the contention of the plaintiff in error is not correct, and, more than that, it is not necessary to decide on this record. A complete interpretation of the sections would, of course, determine between those views, but on that determination other rights than those submitted for judgment may be passed upon, and we prefer therefore to reserve our opinion.

There was some contrariety of views in the cases on other points. There was discussion as to whether veins cross on their strike or their dip, and it was held that they could cross on both strike and dip, but as to the exact application of § 2336 to either there was some disagreement.

The supreme court of Arizona said: "Congress had in mind, at the time of the enactment of the law of 1872, that, as mining rights then stood, A's lode might legally cross B's lode on the strike, and whether on the dip or not, makes no difference; and § 2336 was designed to define the rights of A and B in the space of intersection." *Watervale M. Co. v. Leach*, 33 Pac. 418.

The supreme court of California held in *Wilhelm v. Silvester*, 101 Cal. 358; 35 Pac. 997, that the provisions of the section could readily be construed as intending to protect the rights of old ledge locations; and, speaking of veins intersecting on their dip, said: "Moreover, there is strong reason for thinking that such an intersection was the very one in the mind of Congress when it passed § 2336; for in that section, and speaking of the same subject, it says that 'where two or more veins *unite*, the oldest or prior location shall take the vein *below* the point of union,' and if the other kind of intersection [on the strike] was in the minds of the legislators at that time they would not have used the word 'below;' for 'below' would not apply at all to a union on the strike of two

veins, such as the appellant's rights depend on in the case at bar." But the chief justice of the state, concurring in the result, observed:

"I think, however, that too much is conceded, both in the opinion of the court and in the argument of counsel for respondent, in assuming that the provisions of § 2336 cannot be applied to locations made since the passage of the mining law of 1872 on veins which intersect upon their strike without bringing it in conflict with the plain terms of § 2322. This wholly unwarranted assumption has been the source of all the trouble and difficulty which the land office and some of the state courts have encountered in their attempts to construe provisions of a statute which are in perfect harmony, but which have been erroneously supposed to be inconsistent."

The supreme court of Colorado concurred in the conclusions of the courts of Arizona and California, and expressed its own view as follows:

"Our conclusion is that the provisions of § 2336 apply to locations made under the act of 1872, as well as before, refer to the intersection or crossing of veins either upon their strike or dip; that the space of intersection in determining the ownership of ore within such space means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins (underneath the surface) which he owns or controls outside of that space. This construction renders the two sections entirely harmonious, gives effect to every clause and part of each, and in so far as § 2336 regulates or in any manner provides for rights as between conflicting claims, it applies only to intersections consistent with all the provisions of § 2322."

See, for the views of the supreme court of Montana, *Pardee v. Murray*, 4 Mont. 234, 2 Pac. 16.

2. The other assignments of error relate to rights claimed by plaintiff in error by the location of the tunnel site, and present the questions whether such location gave to the plaintiff in error the following rights: Of way through the lode claims of the defendant in error; of possession of the blind veins cut by the tunnel underneath the claims of the defendant in error.

The plaintiff in error asserts the right of way for its tunnel under § 2323 by implication, and from that implication, and the rule it contends for as to cross veins, deduces its right to all of the blind veins. The contention as to cross veins we have answered, and the deduction as to blind veins is not justified. The section contemplates that tunnels may be run for the development of veins or lodes, for the discovery of mines, gives a right of possession of such veins or lodes, if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. There is no implication of a displacement of surface locations made before the commencement of the tunnel. Indeed, there is a necessary implication of their preservation. And there can be no implication of a conflict with the rights given by § 2322. The exclusiveness of those rights we have declared. The tunnel can only be run in subordination to them. How else can § 2322 be given effect? There are no exceptions to its language. The locators "of any mineral veins, lode, or ledge" are given, not only "an exclusive right of possession and enjoyment" of all the surface included within the lines of their locations, but "*of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.*" A locator therefore is not confined to the vein upon which he based his location and upon which the discovery was made. "All veins or lodes having their apices within the planes of the surface lines extended downward are

his, and possession of the surface is possession of all such veins or lodes within the prescribed limitations." Barringer & Adams, *Mines & Mining*, page 442.

Under the old law the miner "located the lode. Under the new [the act of 1872] he must locate a piece of land containing the top or apex of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top or apex of the vein. If he makes such a location, containing the top or apex of his discovered lode, he will be entitled to all other lodes having their tops or apices within their surface boundaries." Lindley, *Mines*, § 71.

And this court said, speaking by Mr. Justice Brewer, in *Campbell v. Ellet*, 167 U. S. 116:

"But the patent is not simply a grant of the vein, for, as stated in the section, 'a patent for any land claimed and located for valuable deposits may be obtained in the following manner.' It must also be noticed that § 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines of their locations, and all veins, lodes, and ledges, the tops or apices of which are inside such lines. So that a location gives to the locator something more than the right to the vein which is the occasion of the location." See also *Del Monte Co. v. Last Chance Co.*, 171 U. S. 55.

The only condition is that the veins shall apex within the surface lines. It is not competent for us to add any other condition. Blind veins are not excepted, and we cannot except them. They are included in the description "all veins" and belong to the surface location.

3. The same reasoning disposes of the claim of plaintiff in error to the right of way for its tunnel through the ground of defendant in error, so far as the right of way is based on the statutes of the United States. So far as it is based on

the statutes of Colorado it is disposed of by their interpretation by the supreme court of Colorado, and, expressing it, the court said:

"It is contended by counsel for appellant that, under § 2338, Rev. Stat. U. S. and § 3141, Mills's Anno. Stat. it is entitled to such right. The first of these sections provides that in the absence of necessary legislation by Congress the legislature of a state may provide rules for working mines involving easements, drainage, and other necessary means to their complete development, and that these conditions shall be fully expressed in the patent. The section of Mills referred to provides that a tunnel claim located in accordance with its provisions shall have the right of way through lodes which may lie in its course, but it will be observed that this section only refers to tunnels located for the purposes of discovery, and if any of its provisions are still in force,—which appears to be doubted in *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521,—they can have no application to the case at bar, because the section of the Revised Statutes only provides for easements for the development of mines, and the section of Mills relied upon does not attempt to confer any such rights, but is limited to the one purpose of discovery. In this respect it has been clearly superseded by the act of Congress, so that if appellant is entitled to the right claimed it must attach by virtue of some provision of this act."

4. An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in two of the patented claims of the defendant in error, towit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary.

Judgment affirmed.

HARRY KIRK ET AL. v. ANDREW MELDRUM ET AL.

(28 Colorado 453; 65 Pac. 633. Supreme Court. June 3, 1901.)

- ¹**Proof of location on vacant land.** In suit supporting adverse claim plaintiff must show as one of the material facts that his location was made on unoccupied and unappropriated mineral domain subject to location.
- ²**Initiation of title by trespass.** Title cannot be initiated by entry upon a prior valid existing location.
- Admission by locator.** Defendant admitted that certain ground was vacant though in fact it was occupied by him. Afterwards he filed an amended location certificate including such ground. In the absence of specific proof that the ground was taken up by plaintiff after the admission and before the relocation: *Held* no proof of a location by plaintiff on vacant ground.
- On a ruling excluding evidence** the record must show that the rejected evidence was material.
- A non-suit may be allowed in an adverse claim suit**, but this does not preclude defendant from proving affirmatively and establishing his own right of possession.
- The area of a placer location is limited to twenty acres to each locator**, but a number of individuals may locate a claim in common, not exceeding twenty acres to each person, and not to exceed one hundred and sixty acres in any one claim.
- Proof of district rules.** In an adverse suit against a placer location if plaintiff wishes to attack the validity of defendant's location on the ground that the local rules and regulations of the district have not been complied with, it is necessary for plaintiff to show what such rules and regulations are.
- The statutory right to file amended record applies to all classes of mining claims and therefore includes placer claims.**

Appeal from District Court, San Miguel County.

Action by Harry Kirk and others against Andrew Mel-

¹*Moyle v. Bullene*, 7 Colo. App. 308; 44 Pac. 69; *Reynolds v. Pascoe*, 24 Utah 219; 66 Pac. 1064. *Tuolumne Co. v. Maier*, 21 M. R. —.

²Location cannot be made by force or ouster. *Thallman v. Thomas*, 21 M. R. 573. *Nevada Co. v. Home Co.* 98 Fed. 673; 20 M. R. 283.

drum and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

L. C. KINIKIN and H. B. O'REILLY, for appellants.

M. B. GERRY and CALVIN E. REED, for appellees.

GABBERT, J. This action was commenced by appellants, as plaintiffs, in support of their adverse as the owners of the Polly placer, against the issuance of patent to the Ada placer, property of the appellees. At the conclusion of the testimony on the part of plaintiffs, the defendants moved for a non-suit for the reason that it had not been shown that the Polly was located on unoccupied public domain, and, as a matter of fact, that the locators knew at the time of location that the ground embraced within the boundaries of the Polly placer was claimed by the defendants as the Ada placer, and had been worked by them, and that they were in the undisputed possession of such premises. Plaintiffs, at their request, were then permitted to introduce further testimony. At the conclusion of this evidence, the defendants again renewed their motion for a non-suit, which was sustained, the cause taken from the jury, and the action dismissed at the costs of plaintiff. From this judgment they bring the case here for review on appeal. The two principal points urged by counsel for plaintiffs are (1) that the court erred in taking the case from the jury; and (2) there can be no non-suit in an adverse case.

In support of the first proposition it is claimed that the uncontradicted testimony on the part of plaintiffs establishes that the Polly was located upon public domain subject to location. On behalf of defendants it is contended that this testimony discloses that the Polly was located upon ground which at the time of such location was occupied and possessed by defendants, who had erected boarding houses, black-

smith shops, bunk houses, and other improvements thereon, of which they were in possession. The radical difference between counsel with respect to what the testimony establishes arises from the conclusions which the witnesses and counsel deduce from the real facts, rather than from any dispute as to what the material testimony is. The Ada was located July 16, 1895; the Polly, July 13, 1898. Two witnesses on behalf of the plaintiffs testified that the location of the Polly was made upon unoccupied public domain. These statements appear to be based upon the fact that, between about the 1st of June and the 4th of July preceding the date of the location of the Polly, the defendant Meldrum had stated to them that he had discovered that the ground in controversy was vacant, or that, in assisting in making a survey in which he was interested, it was ascertained that such premises had not been claimed by any one. These witnesses also state (and with respect to which there is no dispute) that at the time of the location of the Polly, and for a long time prior, the defendant Meldrum was in the actual possession of the premises in controversy; that he had erected thereon a blacksmith shop and boarding and bunk house, which were used and occupied; that there was also upon the premises the dump of the Meldrum tunnel, and a ditch constructed by Mr. Meldrum, or under his direction; that one of the discoveries upon which plaintiffs relied to support their location was made in the very near vicinity of the blacksmith shop; and that all the discoveries were made by plaintiffs and others while they were in the employ of the defendant Meldrum. The latter was also called as a witness on behalf of plaintiffs, and stated in substance, that the territory embraced in the Polly placer was within the boundaries of the Ada. It also appears from the evidence that, some time subsequent to the date of the conversation between the witnesses and defendant Meldrum with respect to the ground in controversy being vacant, an amended location certificate was filed upon the

Ada. It is asserted in the brief of counsel for plaintiffs that this amended certificate was filed after the location of the Polly, but we find nothing in the record bearing on the date of such filing which is material.

The foregoing is all the testimony on the subject of the occupancy of the disputed premises at the date the Polly was located. This testimony not only fails to show that at the date of the location of the latter the territory embraced therein was unoccupied, but, on the contrary, establishes that it was wholly within the boundaries of the Ada, of which the defendants were in the actual possession at the time of the location of the Polly. This was sufficient to *prima facie* establish that the Ada was a valid, existing location. *Lebanon M. Co. v. Con. Republican M. Co.*, 6 Colo. 371. It was incumbent upon plaintiffs to show, as one of the material facts necessary to establish the validity of their location, that it was on unoccupied and unappropriated mineral domain, subject to location. *Cleary v. Skiffich*, 28 Colo. 362, 65 Pac. 59; *Armstrong v. Lower*, 6 Colo. 393.

Title to a mining claim cannot be initiated by an entry upon a prior, valid, existing location. *Moyle v. Bullene*, 7 Colo. App. 308, 44 Pac. 69.

The fundamental principle governing the rights of parties to claims upon the public domain is that the bona fide occupant, for a purpose recognized by the law, is entitled to hold possession as against one subsequently attempting to initiate title to the same premises, unless the latter establishes a state of facts clearly demonstrating that the actual occupant is in possession without right. In a question propounded to Mr. Meldrum, it is assumed that an amended certificate was filed on the Ada on August 18, 1898, but we cannot presume that this is the amended certificate to which the witnesses for plaintiffs refer. We understand the contention of counsel for plaintiffs to be (although the record is not altogether clear upon this proposition) that an amended certificate on

the Ada so changed its boundaries that it included the ground upon which the Polly was located. In the absence of any testimony tending to disclose when such certificate was filed, it cannot be assumed that the boundaries of the Ada were so changed to the prejudice of plaintiffs. It was necessary for them to establish this fact affirmatively. There was ample time between the date when they say Mr. Meldrum stated that the premises located as the Polly were vacant and the date of such location for the defendants to have amended the boundaries of the Ada.

It is urged by counsel for plaintiffs that the ruling of the court in not permitting certain questions to be propounded to the defendant Meldrum at their instance was prejudicial, in that, if such questions had been permitted to be answered, they might have disclosed that the Ada placer was not a valid location or claim. These propositions are designated in the assignment of errors as follows:

(a) In refusing to require Mr. Meldrum [defendant] to testify as to whether the plat C of the original and amended Ada placer location and of the Polly placer was correct, or nearly so.

(b) In refusing to require him to state what was on the original discovery stake of the Ada placer located by him in July, 1895.

(c) In refusing to require him to testify as to the differences in form, location, etc., of the original Ada location of 1895, and the amended location thereof of August 18, 1898.

(d) In refusing to require him to testify as to what was ever done in or about the Ada placer that was not done under and by virtue of and for the Meldrum tunnel site.

(e) In refusing to require him to testify as to whether any ore was ever extracted by him from the Ada placer.

The plat referred to does not appear in the bill of exceptions, and we are unable to determine whether it was material or not. In the circumstances of this case, so far as shown by the record, it is immaterial what the original notice posted on the Ada may have stated. If it appeared that an amended certificate of the Ada was filed after the location of

the Polly, and that it in fact embraced the territory included within the latter, it might have become material to show the difference in form of the original Ada location and the amended, but this material fact is not shown. It was assumed, in a question to the defendant, that such an amended certificate was filed August 18, 1898; but we cannot assume from this question that its boundaries, as defined at the date of the location of the Polly, were changed to the prejudice of plaintiffs by a certificate filed in August, 1898.

By reference to the bill of exceptions, it appears that the defendant Meldrum was asked what work was performed in and about the Ada that was not used under and by virtue of the Meldrum tunnel site. If the improvements on the Ada were utilized for the benefit of the tunnel, such action would not invalidate the Ada location. Neither would the validity of such location in any manner depend upon the extraction of ore therefrom.

The second proposition for appellants is based upon the requirements of the amendment to section 2326, Rev. St. U. S., which provides that, in adverse proceedings, if title to the ground in controversy is not established in either party, the jury shall so find, and judgment shall be entered accordingly. If a verdict had been returned, it should have conformed to the law. The jury, however, was not required to make any findings. The court held that plaintiffs had failed to prove facts necessary to make a *prima facie* case. This entitled defendants to a non-suit as to plaintiffs' cause of action. Section 166, Code. Defendants did not ask for a verdict or obtain an affirmative judgment in their favor. In addition to a motion for non-suit, they asked that the cause be dismissed. Plaintiffs, having failed to prove a cause of action, cannot complain that the action was dismissed. True, their failure to establish title to the Polly did not relieve the defendants from the necessity of establishing their owner-

ship and right of possession to the Ada, if they desired a verdict upon which a judgment could be predicated affirmatively establishing their ownership and right of possession to the disputed premises. If, however, the defendants did not see fit to introduce evidence and secure a verdict in accordance with the provisions of section 2326, supra, that was a matter which they could determine for themselves. The provision in question only prescribes what shall be found by the jury if a verdict is returned. If one party is non-suited and the action dismissed, as in this instance the law is not violated; nor is there anything in the law which prohibits this course.

It is urged that the Ada location is void because it embraced more than 20 acres, and that placer locations are governed wholly by local rules and regulations, and also that the law does not permit an amended certificate to be filed upon a placer. The Ada was located by the defendants. Its area, as originally claimed, or as embraced within the amended location certificate, did not exceed 40 acres. The construction of the act of congress with respect to placers has universally been that the act makes provision for such locations, and prescribes the area which may be located,—in other words, the area is limited to 20 acres to each locator,—and that a number of individuals may locate a claim in common, not exceeding 20 acres to each person, and not exceeding 160 acres in any one claim. Morr. Min. Rights, (10th Ed.) 179. It may be true that the location of placers can be controlled by local rules, regulations, and laws not in conflict with the act of congress on the subject, but that is immaterial in this instance. If plaintiffs wished to attack the validity of the Ada location upon the ground that such local rules and regulations had not been complied with by the locators, it was necessary for them to show what such rules and regulations were. Section 3160, Mills' Ann. St., provides that the locator of any mining claim may file an additional

certificate thereon, subject to the provisions of the act. This section embraces all classes of mining claims, and therefore those known as "placers."

The judgment of the district court is affirmed.

Affirmed.

THE STATE V. ORVILLE K. MOORE.

(27 Indiana App. 83; 60 N. E. 955. Appellate Court. June 7, 1901.)

Interference with stop cocks. The statutory offense of turning gas cocks on or off without the owners consent forbids the act itself on grounds of public policy and the defendant may be convicted without proof of criminal intent.

Lessor no right to shut off gas. Where one executes a gas and oil lease on his farm to a company, and the company pipes gas from a well constructed on the leased premises to consumers, without right to do so, and in violation of the lease contract, the lessor has no right to turn off the gas from the line to prevent a wrongful act by the lessee, but must resort to his legal remedy.

Dangerous character. It is a matter of common knowledge that natural gas is a dangerous agency and of that fact courts take judicial notice.

Appeal from Circuit Court, Blackford County.

E. C. VAUGHN, Judge.

Orville K. Moore was acquitted in a prosecution for turning off valves in pipes conveying natural gas, and the state appeals. Appeal sustained.

¹The Court takes judicial notice of the explosive and inflammable nature of natural gas. *Jamieson v. Indiana Co.* 128 Ind. 555; 28 N. E. 76.

Its dangerous character brings it within the police power of the State. *Id.*

The Indiana Gas Pressure Act sustained. *Id.*

The Court takes judicial notice that coal oil is inflammable. *State v. Hayes*, 78 Mo. 307.

Statutory liability for explosions though without negligence. *Ohio Co. v. Andrews*, 50 Oh. St. 695; 35 N. E. 1059.

County ordinance prohibiting gas tanks within certain points held prohibitive of a legitimate business and void. *In re Smith*, 134 Cal. 363; 77 Pac. 180.

A natural gas company is liable for an explosion from an old leak which they should have discovered. *Hartman v. Citizens' Co.* — Pa. —; 59 Atl. 315.

A. M. WALTZ, W. L. TAYLOR, Atty. Gen., MERRILL MOORES, and C. C. HADLEY, for state.

JAY A. HINDMAN, S. W. CANTWELL and L. B. SIMMONS, for appellee.

ROBINSON, J. Section 2 of the act of June 3, 1891 (Burns' Rev. St. 1894, § 2312), provides: "It is hereby declared to be unlawful for any person to make, or cause to be made, any connection or reconnection, with the gas mains or service pipes of any person, company or corporation, furnishing to consumers natural or artificial gas, or to turn on or off, or in any manner interfere with any valve or stop-cock, or other appliances belonging to such person, company or corporation, and connected with its service or other pipes, or to enlarge the orifice of mixers, or to use natural gas for heating purposes except through mixers, without first procuring from such person, company or corporation, a written permit to turn on or off such stop-cock or valve, or to make such connections or reconnections or to enlarge the orifice of mixers, or to use gas for heating without mixers, or to interfere with the valves, stop-cocks or other appliances of such person, company or corporation, as the case may be." The fifth section of the act provides the penalty for its violation.

Appellee was acquitted in a prosecution for unlawfully interfering with two valves or stop-cocks connected with the pipes of a corporation engaged in furnishing natural gas to consumers, by turning off the valves so as to stop the flow of gas, without first having procured a written permit to do so.

Counsel for appellee insist that no question is presented by the record, for the reason that the appeal was not taken as the statute directs.

Section 1915, Burns' Rev. St. 1894 (section 1846, Horner's Rev. St. 1897), provides:

"The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the supreme court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved."

Section 1956, Burns' Rev. St. 1894 (section 1883, Horner's Rev. St. 1897), provides:

"In case of an appeal from a question reserved on the part of the state, it shall not be necessary for the clerk of the court below to certify, in the transcript, any part of the proceedings and record except the bill of exceptions and the judgment of acquittal. When the question reserved is defectively stated, the supreme court may direct any part of the proceedings and record to be certified to them."

The state, by bills of exceptions, has brought to this court all the evidence on the trial and the instructions given the jury.

The statute provides that an appeal may be taken by the state in certain cases, among them "upon a question reserved by the state." Burns' Rev. St. 1894, § 1955 (Horner's Rev. St. 1897, § 1882). To reserve a question for review, an exception must be taken as the law directs, and carried into the record. "All the authorities point in one direction, and that is that there must be a specific ruling made, a direct exception, and a bill of exceptions embodying the ruling, the exception, and such facts as are necessary to enable the appellate tribunal to understand and decide the particular question reserved." Elliott, App. Proc. § 278, note; *State v. Lusk*, 68 Ind. 264. Where there has been a verdict of acquittal in a criminal prosecution there can be no motion for a new trial. In a civil action the evidence cannot be put into the record until the trial court has had an opportunity to review its findings or the jury's verdict. *Doe v. Herr*, 8 Ind. 24. In *State v. Bartlett*, 9 Ind. 569, where there had been a verdict of acquittal, it is said that "the entire evidence, even

if set out correctly, is no part of the record." The reason given for the rule is that there could be no motion for a new trial; citing *Doe v. Herr, supra*. We do not think it necessary to inquire whether the case of *State v. Bartlett, supra*, intends to hold that where the bill of exceptions contains all the evidence, and shows an objection to certain evidence and an exception properly reserved, no question is presented, for the reason that the question thus sought to be raised is presented in the case at bar in an exception taken to instructions given.

Objection is made to certain instructions given and to certain evidence introduced, and these present the question whether, under section 2312, *supra*, appellee might excuse the unlawful act by showing his good intention.

The court instructed the jury that the defendant should not be convicted unless the jury believed that in doing the acts charged he acted with an evil intent, or intended to perform a wrongful act. And also that if the defendant executed to a company a gas and oil lease on his farm, and the company thereafter constructed a well thereon, which produced gas in large quantities, and piped the gas therefrom to consumers without right to do so and in violation of the contract, and used gas for no other purpose, and was so using it at the time of the offense, the defendant had the legal right to turn off the gas from the line, and prevent the wrongful use thereof by the company.

The maxim "*Actus non facit reum, nisi mens sit rea*," cannot have a like application in all cases. It must be given a meaning with reference to the particular definitions of crimes. The *mens rea* in manslaughter means a guilty mind, but it would be contradictory to say these words mean a guilty mind in a case of manslaughter by negligence,—to say that the mere absence of mind is a guilty mind. It is evident that the maxim cannot have a universal application, and that an act may be a crime without the element of intent.

It is a matter of common knowledge that natural gas is a

dangerous agency, and of that fact courts take judicial notice. As such agency, it is clear that its use may be made the subject of police regulation. The legislature in the act in question concluded, as it had the power to do, that the public safety and welfare required that the use of natural gas is a subject properly within legislative control. The act charged is not made a crime because of its moral turpitude or the criminal intent with which it was committed, but it is a prohibited act from motives of public policy. The statute makes the act charged unlawful. The doing of the act is a misdemeanor. The question is not whether he intended to perform a wrongful act. If he did the act without having the written permit, he violated the statute, regardless of whether or not it was done with evil intent. If the agreement or lease introduced in evidence contained anything that might be construed as a permit to appellee to interfere with the main under certain conditions, a different question would be presented. But the lease contains no such stipulation, nor anything that might be construed as such. If appellee had a contract that was being violated, a court would have granted relief. Appellee was charged with the voluntary commission of an act prohibited by a statute passed to subserve a public policy, and the voluntary doing of the act, regardless of his intent, constitutes the offense. *State v. Engle* (Ind.), 58 N. E. 698, and cases cited; *Com. v. Raymond*, 97 Mass. 567; *State v. Hartfiel*, 24 Wis. 60; *Eagle v. Nowlin* (D. C.), 94 Fed. 646. See *Barton v. State*, 99 Ind. 89; *Tilford v. State*, 109 Ind. 359, 10 N. E. 107; *Edwards v. State*, 121 Ind. 450, 23 N. E. 277.

The appeal is sustained.

CROWN POINT GOLD MINING CO. v. S. C. CRISMON ET AL.

(39 Oregon 364; 65 Pac. 87. Supreme Court. June 10, 1901.)

If a location be not completed within the statutory time it is immaterial if in fact completed at any time before the second locator appears on the ground.

In equity cases documentary evidence need not be offered before the referee, but may be first produced at the final hearing.

¹Plaintiff in possession may maintain suit to quiet title against another who is asserting title to the same ground. The rule applied on the facts to a case where plaintiff had worked a claim for several years and defendant had recently entered and made a location.

Mining rights forfeited by failure to perform assessment work are revived by doing the required amount of work in any year, if it is done before a relocation.

Review of testimony as to annual labor alleged to have been done in tunnel with the holding that it was sufficiently proved under the rule requiring clear case to enforce a forfeiture.

Appeal from Circuit Court, Baker County.

ROBERT EAKIN, Judge.

¹Defense of title in third party (that a prior location had not been abandoned) not available to defendant in suit to quiet title. *Ramus v. Humphreys*, 21 M. R. 450.

Plaintiff need not set forth his own title. *Union Co. v. Warren*, 82 Fed. 519.

Holder of possessory title may file such bill. *Gillis v. Downey*, 19 M. R. 253.

"A claimant out of possession can not convey his title to the holder of the adverse title in possession, and then sue the grantor of such adverse title in equity to cancel the title papers of such adverse title as a cloud on the title which he has conveyed to the holder of such adverse title." *Zinn v. Zinn*, 54 W. Va. 483; 46 S. E. 202.

A bill to quiet title will not lie in favor of a party not in possession unless the land is vacant. *McConnell v. Pierce*, 210 Ill. 627; 71 N. E. 622.

In the action to quiet title plaintiff (as in ejectment) must recover on the strength of his own title. *Schroder v. Aden M. Co.* 144 Cal. 628; 78 Pac. 20.

Bill by the Crown Point Gold-Mining Company against S. C. Crismon and another to determine the title of a mining claim. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

On January 1, 1889, A. H. Huntington, J. C. Young, and A. Olsen posted a discovery notice on the Crown Point quartz claim in Baker county, and during the following summer marked the boundaries thereof, on the ground so that they could be readily traced. Their interest in the claim was subsequently sold and transferred to the plaintiff corporation. On July 1, 1899, the defendants, deeming the mine forfeited on account of failure to perform the annual assessment work required by the statutes of the United States, located the same ground under the name of the "Alice." Their notice of location was recorded on the 10th of July. About the same time the plaintiff's manager with two men went out to the mine and commenced work in opening and developing it. A few days later, and while they were so at work, defendants entered upon the claim, and began to dig and extract ore therefrom, and were so engaged July 26th, when this suit was commenced. The plaintiff alleges that at the time of the defendants' entry and of the commencement of the suit it was in possession of the property, and entitled thereto; that on or about July 10th defendants wrongfully and unlawfully entered upon the claim, and began to dig, excavate, and carry away ore therefrom, which they will continue to do unless restrained, to the great and irreparable injury of the plaintiff and the impairment of the estate. A demurrer to the complaint having been overruled, the defendants answered, denying the material allegations thereof, and for an affirmative defense alleging, in substance, that neither the plaintiff nor its predecessors in interest had expended \$100, or any other amount, annually, in the improvement or development of the claim, since the year 1891, and that the claim had thereby

become forfeited; that by reason thereof it was unoccupied and unappropriated mineral land of the United States, and as such was located by the defendants by posting their location notice upon a vein or lode at the point of discovery, and marking the boundaries on the ground; that thereafter they began to work upon and improve the claim, which work is the act complained of by the plaintiff. The reply put in issue the new matter alleged in the answer. The cause was referred to a referee to take and report the testimony, and upon final hearing a decree was rendered in favor of the plaintiff, from which the defendants appeal.

COURTNEY & KNIGHT, for appellants.

SMITH & HEILNER, for respondent.

BEAN, C. J., delivered the opinion.

1. It is urged that, because Huntington, Young, and Olsen did not mark the boundaries of the claim on the ground for six months after the posting of their discovery notice, their location is invalid. But a subsequent locator cannot object that the first location was not marked in time, provided it was sufficiently marked before his location. *Jupiter M. Co. v. Bodie M. Co.*, 11 Fed. 666. Defendants do not contend that they made a location prior to the 1st day of July, 1899,—long after the location of Huntington and others had been properly marked on the ground,—and hence they are not in a position to take advantage of the delay.

2. It is next insisted that there is no competent proof of the transfer of the possessory rights of Huntington and others to the plaintiff, as the documentary evidence in reference thereto was offered on the trial, and not before the referee. But, as we understand the law, written documents, especially such as are proved by authenticated copies, may be put in evidence on the hearing, and it is not necessary to

offer them before a referee, whose duties are confined to taking and reporting the testimony. It was so held in *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173.

3. We do not think the rule has been changed by the act of 1893 (Sess. Laws 1893, p. 26). The provisions of such act that all documentary evidence shall be preserved and incorporated in the referee's report were intended to refer to the documentary evidence that might be offered before the referee, and not to require that all such evidence be so offered.

4. It is next contended that the plaintiff's remedy is in ejectment, and not by a suit in equity. The evidence shows, however, and the court below found, that the plaintiff was in actual possession of the claim in controversy at the time of the commencement of the suit, and under section 504 of the statute (Hill's Ann. Laws) it was entitled to resort to a court of equity to determine an adverse claim thereto, and quiet its title.

5. And, finally, it is contended that the evidence does not support the finding that the plaintiff performed or caused to be performed the annual assessment work upon the claim in 1898, as required by the statute of the United States. From the time of the location by Huntington and others, up to 1898, more or less work seems to have been done on the claim each year, except in 1893 and 1894. The evidence as to its amount or character is not very satisfactory; but this is not material, because, if the required annual work was done by plaintiff for the year 1898, its right to the claim would be revived, although chargeable with a previous default. *Justice Co. v. Barclay*, 82 Fed. 554.

6. In 1898 one Probasco was employed by the plaintiff to do the assessment work for that year, and the principal question in this case is whether he performed the requisite amount thereof. There is much testimony concerning the length of time he was at the mine, and the amount and char-

acter of his work. Most of it, however, is given by witnesses who formed their conclusions from an inspection of the mine and their knowledge of Probasco's whereabouts. Probasco himself testified that he did 20 days' work, with his own tools and appliances, in the upper tunnel, of the reasonable value of \$5 a day; but he is not able to give any clear idea of how far he extended the tunnel, or the number of hours he worked each day. Many witnesses were called for the defendants, who gave evidence to the effect that, from the appearance of the mine and the dump and their knowledge of Probasco's employment during the time he was at the mine, he did not do the requisite amount of work. Two or three testified that they were in the tunnel in 1898, just before Probasco commenced work thereon, and again in July, 1899, and that there was no perceptible change, except that it had been extended about three feet. There is evidence in the record, however, tending to show that it would have been impossible at that time to determine, by a mere inspection of the tunnel, how much work had been done the year before, on account of the action of the water on its walls. The most reliable testimony upon which to base an intelligent opinion on this point is that of the witness Barbee, who says that in the fall of 1897 he went out to the mine for the express purpose of ascertaining whether the requisite amount of work had been done for that year, and while there measured the upper tunnel by stepping, and that it was in 50 feet at that time. It is admitted, and so testified by the defendants, that in July, 1899, this tunnel was in 71 feet. The evidence further shows, and it is not pretended otherwise, that no work was done in it between the time it was measured by Barbee in 1897 and July, 1899, except what was done by Probasco in the fall of 1898; so that, if Barbee's testimony as to the length of the tunnel in 1897 is true (and it is uncontradicted), it must necessarily follow that Probasco drove the tunnel at least 20 feet in 1898. The great weight of the evi-

dence shows that it is worth at least \$5 a foot to do such work. It would seem, therefore, that the court below was fully justified in finding that the claim was not forfeited, as alleged, on account of a failure to do the requisite assessment work, and especially since "a forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law." *Hammer v. Milling Co.*, 130 U. S. 291.

The decree is therefore affirmed.

J. O. HARDWICK V. JAMES A. McCLURG ET AL.

(16 Colorado App. 354; 65 Pac. 405. Court of Appeals. June 10, 1901.)

¹Severable contract. Defendants' assignor took an option for the purchase of a lease, some stock and an interest in a tunnel site. *Held*, a severable contract and that the lease being delivered upon the first payment defendant was entitled to hold the lease though he declined to carry out the other terms of the option.

Facts of the case. Defendant's assignor agreed to buy stock, a lease, and an interest in a tunnel site, to be paid for one dollar down, a certain sum in 10 days, and a certain sum every 90 days until the whole amount was paid. The lease was to be assigned on payment of the sum due in 10 days, the stock to be delivered proportionately as payments were made, and a deed to the tunnel site delivered on final payment, it being understood that the contract constituted an option to purchase all of the property at the price named, and, in default of payment as provided, the stock and deed to be redelivered to plaintiff. Plaintiff assigned the lease to defendant on payment of the amount due in 10 days, and sued for a reassignment of the lease on defendant's failure to make the other payments. *Held*, that he could not recover, since the contract was unilateral, and defendant was entitled to an assignment of the lease on the payment which he had made, to reassign which there was no special agreement.

Evidence was not admissible to show that there was a parol understanding and agreement between plaintiff and defendant's assignor that, if there was a default in any of the payments, the lease should be reassigned to plaintiff, as it would contradict or vary the written agreement.

There was no ambiguity in the contract rendering the attendant circumstances and the acts and the declarations of the parties at the time admissible to explain it.

¹Vendee in consideration of getting option agreed to expend money in sinking shaft. Afterwards it was found vendor could not make title: *Held*, that vendee could not recover cost of expenditure. *Benson v. Braun*, 134 Cal. 41; 66 Pac. 1.

After deposit of deed in escrow, pending application for patent, a conflict was found to exist between the vendors claim and a claim owned by the buyer, who filed protest and prevented issue of patent to the conflict: *Held*, That inability to perform, so caused by de-

Appeal from District Court, El Paso County.

Suit by J. O. Hardwick against J. A. McClurg and D. H. Moffat to compel reassignment of a lease. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

GUNNELL, CHINN & MILLER, and BLACKMER & McALLISTER, for appellant.

TYSON S. DINES, for appellees.

THOMSON, J. On the 11th day of September, 1897, the Montreal Gold Mining & Milling Company, by its written contract of that date, leased the Fluorine mining claim to W. J. Scott for the term of 15 months upon the conditions specified in the contract. On the 11th day of November, 1897, Scott, by assignment in writing, indorsed upon the contract, transferred to J. O. Hardwick all his right, title,

plaintiff's act, was no defense to suit for purchase money. *Griffin v. American M. Co.* 123 Fed. 283; overruling *S. C.* 114 Fed. 887.

Construction of contract for sale of coal land holding that the "available coal" intended, included certain acreage under a railroad and under a creek though such coal could only be mined at greatly increased cost. *In re Red Stone Co.* 207 Pa. 125; 56 Atl. 355.

Time though made the essence of the contract may be waived, or relieved against in equity upon proper facts. *Wheeling Co. v. Elder*, 54 W. Va. 335; 46 S. E. 357.

Status of purchaser under Louisiana Civil practice where he stands in "danger of eviction" from flowing well under hostile judgments. *Jennings Heywood Co. v. Home Co.* — La. —; 37 So. 1.

Where a sale of land is consummated vendor is not bound to convey an oil protection which was not surrendered until after the deed was delivered with this protection outstanding and considered in the terms of the sale. *Bracken v. Sobra Vista O. Co.* 143 Cal. 678; 77 Pac. 649.

A party who buys oil land which is under lease buys subject to the construction which he knows the parties have placed on the lease. *Indiana Co. v. Leer*, — Ind. App. —; 72 N. E. 283.

and interest in and to the lease. On the 29th day of November, 1897, J. O. Hardwick and Mr. Kinney subscribed the following instrument in writing:

"This agreement, made and entered into by and between J. O. Hardwick, of the first part, and M. Kinney, of the second part, witnesseth: That the party of the first part hereby agrees to sell and deliver to the party of the second part five hundred and one thousand shares of the stock of the Montreal Gold Mining and Milling Company, and also a lease on the Fluorine lode mining claim, executed by said company to W. J. Scott, and by him assigned to said J. O. Hardwick, and also an undivided one-half interest in and to the Minneapolis tunnel site on Copper Mountain, in the Cripple Creek mining district, upon the conditions following: Provided, the said Kinney shall pay to the said Hardwick the sum of forty thousand dollars (\$40,000) in the manner following: One dollar cash in hand, the receipt of which is hereby acknowledged, nine hundred and ninety-nine dollars (\$999) in ten days from this date, four thousand dollars (\$4,000) in ninety days thereafter, and five thousand dollars (\$5,000) in each and every ninety days thereafter until the whole amount of said forty thousand dollars shall have been paid.

"It is further understood and agreed that said lease shall be duly assigned by said Hardwick and turned over to said Kinney on the payment of said nine hundred and ninety-nine dollars, when said amount shall be paid. All of said stock shall be deposited in the Bimetallic Bank of Cripple Creek when said nine hundred and ninety-nine dollars shall be paid, and to be thereafter delivered to said Kinney, or his assigns, in the manner following: On each payment being made as hereinbefore provided a proportionate amount of said stock, being an amount which shall have been paid for by said payment according to the entire purchase price of said stock, and as each payment shall be made, and a deed to the undivided one-half interest in the Minneapolis tunnel site, as aforesaid, shall be delivered in escrow with said stock in the said the Bimetallic Bank, and shall be delivered to said Kinney, or his assigns, on final payment as herein provided. It is further understood and agreed that when the third payment of four thousand dollars shall have been made the said Hardwick shall assign to the said Kinney, or his order, an account now held by said Hardwick against the Copper Mountain Gold Mining Company for twelve hundred and fifty dollars (\$1250).

"It is further understood and agreed that this contract constitutes and is an option given by said Hardwick to said Kinney to purchase

all the property at the price named, as hereinbefore mentioned and described, and that the terms of payment and the delivery shall be embraced in an escrow agreement indorsed upon the envelope containing said stock and deed as instructions to said Bimetallic Bank for the delivery of said stock and deed as payments shall be made as herein provided; and, in default of said payments being made as herein provided, said stock and deed shall be redelivered to the said Hardwick.

"In witness whereof, the parties hereto have hereunto set their hands this 29th day of November, A. D. 1897.

"J. O. Hardwick.

"M. Kinney."

On December 6, 1897, the following assignment was indorsed on the foregoing instrument:

"For and in consideration of one dollar, the receipt of which is hereby acknowledged and confessed, I hereby sell, assign, and set over to James A. McClurg and his assigns all my right, title, and interest in and to the above mining option and agreement.

"M. Kinney."

On the 7th day of December, 1897, the following instrument of transfer was written upon the lease:

"For and in consideration of \$999 and other consideration not herein mentioned, the receipt of the above-mentioned cash in hand to me paid, the receipt of which is hereby acknowledged, I hereby set over all my right, title, and interest in and to the within lease. Dated this 7th day of December, 1897, at Cripple Creek, Colorado. To James A. McClurg of the city of Denver.

"J. O. Hardwick."

This action was brought by Hardwick on the 22d day of March, 1898. The complaint alleged the execution of the contract between the plaintiff and Kinney, and, in addition, that the plaintiff assigned the lease to Kinney for the purpose of working and developing the property until the second payment mentioned in the instrument they had subscribed should become due; and that it was understood and agreed between them that, if such payment should not be made, or if

there should be default in the other payments, the lease should be reassigned by Kinney to the plaintiff. It was also averred that there was an understanding and agreement between Kinney and the plaintiff that the assignment of the lease was not a sale of the lease, but only an option; that the payment of the \$999 was only the first payment of the entire consideration; and that the agreement that, unless the whole consideration should be paid, the lease should be retransferred, was known to the defendant McClurg. The complaint further alleged that the defendant took possession of the leased premises, and shipped and sold therefrom ore to the value of \$20,000, and that none of the payments subsequent to that of \$999 was ever made. The plaintiff prayed a decree for the reassignment to him of the lease and for an accounting.

The answer denied any knowledge on the part of the defendant of any agreement between Kinney and the plaintiff not embraced in the instrument subscribed by them; and denied that the plaintiff assigned the lease to Kinney, but averred that upon payment by him, the defendant, to the plaintiff, of \$999, the latter assigned the lease to him. The plaintiff has brought the case to this court by appeal from the judgment against him in the court below.

The allegation in the complaint that the plaintiff assigned the lease to Kinney was disproved by the evidence. As we have already seen, the assignment was made directly to McClurg; so that the averments concerning the purpose with which the lease was assigned to Kinney, and the understanding between the plaintiff and Kinney at the time as to the retransfer of the lease, would be immaterial. But no point is made upon this discrepancy in the argument, and we shall adopt the method which counsel have followed in their treatment of the case.

One theory of counsel for the plaintiff is that the evidence

offered would prove an agreement or understanding between Kinney and the plaintiff, not embraced in the instrument they subscribed, but known to the defendant, by reason of which the assignment of the lease to the defendant was tentative merely, and was to operate as an actual transfer only in case all the other payments mentioned in that instrument were duly made; that such evidence was competent, relevant, and material; and that the rights of the parties to this action are controlled by the alleged understanding or agreement. Also, arguing from the language of the instrument, counsel say that it contemplated a sale of the lease, stock, and interest in the tunnel site as a whole for \$40,000; that it did not contemplate a sale of any one portion of the aggregate property detached from the rest; and that, therefore, the \$999 which the plaintiff received when he assigned the lease, was simply part of an entire purchase price. It is the questions arising out of these propositions that are presented to us for consideration.

The contract signed by the plaintiff and Kinney is unilateral. The plaintiff agreed conditionally to do certain things, but Kinney promised nothing. Whether the latter would accept the offer of the plaintiff was entirely optional with him. In the first paragraph of the instrument the plaintiff proposed to sell and deliver to Kinney a quantity of stock, a lease, and an interest in a tunnel site, provided Kinney would pay him \$40,000 in certain specified installments at certain times. Detached from the remainder of the contract, this amounted to an offer to sell the whole property for an entire price. But this proposal was followed by an agreement of the plaintiff that on payment of the \$999 he would duly assign and turn over the lease to Kinney, and the further agreement that the stock should then be deposited in bank, and upon each payment a proportionate amount delivered to Kinney, a deed for an interest in the tunnel site to

accompany the last delivery. In the same connection the plaintiff also agreed upon the third payment to assign to Kinney an account against the Copper Mountain Gold Mining Company for \$1,250.

The last section provided that the contract was to be regarded as an option given by the plaintiff to Kinney to purchase all the property at the price named; that the terms of payment and delivery should be stated on the envelope containing the stock, as instructions to the bank in receiving payments and delivering the stock and deed; and that, in default of payments being made as specified, the stock and deed should be re-delivered to the plaintiff. Now, to arrive at the meaning which was intended to be conveyed by the language used, the whole contract must be read. While, segregated from the rest, the first section, and an expression in the last section, are, perhaps, not inconsistent with the construction for which plaintiff's counsel contend, yet they constitute only part of an entire instrument, and present in general language what is elsewhere particularized. Upon examining all the parts of the contract, we find that the proposition was to sell an enumerated list of articles for a certain sum of money, payable in installments; a designated portion of the articles to be delivered at the time of each payment. It is true that Mr. Kinney had an option to buy the whole property for a definite sum, to be paid in stated amounts at stated times; and, if none of the property was to be delivered until the entire consideration was paid, we should, perhaps, be compelled to agree with counsel. But it was part of the contract that at each payment he should receive a specified portion of the property; and, without special agreement, its retransfer could not be compelled. The option originally embraced all the articles. It was at Mr. Kinney's election whether he should take any of them; but, if he should avail himself of the privilege of taking part of them, making the answering payments, the part taken would be

his; the amount of the property, subject to the option, would be diminished at each payment by exactly the quantity then delivered; and the right of election, which originally applied to the whole, would be confined to the residue. Such would be our judgment as to the intention of the parties from the general language used in providing for payments and corresponding deliveries. But it seems to us that any doubt which might exist respecting such intention is set at rest in the concluding part of the instrument. After providing for the indorsement upon the envelope containing the stock and deed of the terms of payment and delivery as an instruction to the bank, it further provided that, in default of the payments being made as specified in the contract, the stock and deeds should be redelivered to the plaintiff. There is nowhere in the contract any provision for the return of the lease in case of default after the first payment, or for the return of any other of the property in case of default after the payment upon which it was delivered.

Counsel for the plaintiff, in discussing the last paragraph of the contract, offer the following explanation of the provision for the redelivery of the stock and deed and the omission of a provision for the retransfer of the lease: "Counsel for the appellees lays great stress on the last clause of this paragraph, which provides for the redelivery of the stock and deed to said Hardwick, but fails to say anything about the lease. It will be observed that this is a direction to the bank, and is a part of the escrow agreement to be indorsed on the envelope containing the stock and deed. The envelope did not contain either the account or the lease, and the bank had nothing to do with them; so it is natural that no directions should be given it concerning them." Now, if the parties could have foreseen, or if there had been a legal presumption, that McClurg (Kinney's assignee), after paying the first installment, and receiving the lease, would make no further payment, the explanation might be satisfactory. The

deed and all the stock would still remain in the possession of the bank, and there would be nothing in the way of their return to the plaintiff. But McClurg's refusal to proceed further after receiving the lease could not have been foreseen, and there was no legal presumption that he would decline any part of the option. Such being the case, let us see what becomes of the explanation. McClurg might make a number of the payments. There was no right to suppose that he would not make them all. The intention of the provision for the return of the stock and deed was simply to meet a possible failure somewhere along the line of payments. The deed was not to be delivered by the bank until the last payment, so that default anywhere would require the restoration of the deed. After the payment of the \$4,000, following the \$999, seven payments would remain. Let us suppose that Kinney or his assignee had made three of the \$5,000 payments, and then stopped. At the time the contract was made there was no right to suppose that he would not do so, or that he would not do even more. But, having so done, three-sevenths of the stock would have passed out of the possession of the bank, and of that it could make no redelivery; and there was no provision for the return to the plaintiff of that stock. Moreover, at the third payment of \$5,000 (the printed abstract has it \$4,000, but this is a manifest mistake), the plaintiff would have assigned to the holder of the option an account against the Copper Mountain Gold Mining Company of \$1,250, and there was no provision for the return of that account, or of the money realized upon it, if it had been collected.

Here is where the explanation fails. It rests upon a supposition which neither counsel nor we have any right to entertain. From the fact that special provision was made, in case of a stoppage of payments, for the return of all the property that the holder of the option had not taken, and that no provision was made for the return of anything else,

we think it entirely clear that it was the intention of the parties that each delivery, in consideration of the payment then made, carried with it a title which the plaintiff could not question, and that the option survived only as to the residue.

A point is made on the provision for the payment by Kinney to the plaintiff of one dollar cash in hand. The views of counsel upon the effect of that provision can, perhaps, be best understood by quoting their language: "The first payment of \$1 was no doubt intended as the consideration for the option on the entire property. This being true, we will ask the court, if it can, to ascertain what price was put on the lease if it was intended to be sold separately, as the appellees contend. Was it \$999, \$1,000, or should there be an apportionment of the \$1 cash payment, and say that one-fortieth of it was to pay for the option on the lease and thirty-nine fortieths to pay for the option on the property? Is it not more reasonable to conclude that the \$1 was intended as the consideration for the option on the entire property at the gross and entire price of \$40,000, and that this price was divided into payments of \$5,000 each, to be made every ninety days, except the first, second, and third payments, which constitute a like sum of \$5,000? The reason for this, no doubt, was that Kinney did not want to make such a large payment on the option, while, on the other hand, Hardwick did not want to tie his property up ninety days for \$1. Therefore the \$1 was paid to bind the contract, the \$999 was required to be paid in ten days as good-faith money, and \$4,000, the balance of the first \$5,000, was to be paid in ninety days."

It is evident, from an inspection of the instrument, that the total payment upon which Kinney was entitled to a transfer of the lease was \$1,000, and that the \$1 was simply an advancement upon that sum. Without doubt, as counsel say, "the one dollar was paid to bind the contract." The ad-

vancement was a consideration for the option, and disabled the plaintiff from revoking his offer before Kinney or his assignee should be in default. But the option for which it was the consideration was the option proffered in the contract; and what that was, and what the rights of the parties in relation to it were, we have already considered. Counsel has referred us to some decisions holding contracts entire of which there might be several partial performances. *State v. Scoggin*, 10 Ark. 326; *Weed v. Clogston*, 98 Mass. 147; *Wagon Co. v. Crocker* (C. C.) 4 Fed. 577. None of the contracts passed upon in those cases was unilateral. The foundation of the liability of each defendant was his own covenant. If, in the case at bar, Kinney had covenanted with the plaintiff to make the several payments mentioned in the contract at the time specified, and the plaintiff, averring performance, or tender of performance, of his own agreements had brought suit against Kinney to recover the installments in default, it would certainly be held that, although the defendant had incurred successive liabilities, his contract was entire. The difference between a situation like that and the one in hand is obvious. Kinney bound himself by no contract. It is a misuse of terms to say that his contract was entire, for he entered into none. He was at liberty to make as many payments as he chose, and stop when he saw fit; but, so long as he did pay, the plaintiff was bound to make the deliveries for which the payments called. When he ceased, the option, and the obligation of the plaintiff, were at an end; but the default could not affect rights which had previously attached.

If there was any parol agreement such as the complaint alleges, we do not think it was admissible in evidence. The terms of a written instrument cannot be contradicted or varied by parol understandings or agreements. 1 Greenl. Ev. § 275. Where the terms employed are vague or ambiguous, attending circumstances, and the acts and declarations of

the parties at the time, may be considered, not to add to or detract from the contract as it was written, but to find what meaning the parties intended to convey by the language they used. 1 Greenl. Ev. § 277; *McPhee v. Young*, 13 Colo. 80, 21 Pac. 1014; *Lee v. Cravens*, 9 Colo. App. 272, 48 Pac. 159. There was no ambiguity in this written contract. It required no explanation. But, even if the contract had needed the light which circumstances or declarations might have shed, the proof offered would not have supplied the want. It would have shown, not the true meaning of the written contract, but a different and inconsistent contract.

We have proceeded to this point on the theory that there was some understanding between the parties to the contract, such as the complaint alleges, and have reached the conclusion that, conceding to the plaintiff his alleged facts, the judgment was right; but none of the evidence offered tended to prove that any understanding or agreement inconsistent with the terms of the written contract ever had an existence. The only allusion to a conversation relating to that contract found in the evidence is contained in the following excerpt from the testimony of the plaintiff:

"Q. After this paper was drawn up, was there any conversation between yourself and Mr. Kinney and Mr. Montgomery as to the facts of what was conveyed by the option?

"A. Mr. Kinney dictated the option to Mr. Montgomery, and, after it was typewritten, Mr. Montgomery read the contract over to both of us, and I asked Mr. Montgomery, after he read it over, what was the tenor of that option or contract. He said: 'It means this: This is an option on a certain amount of stock for ten days, and, if they pay \$999 at the end of ten days, then they can run ninety days longer, and then the \$4,000 becomes due; and, if the \$4,000 is not paid at that time, the option is null and void.'"

It will be observed that this bears no resemblance to the supposed understanding which has been the subject of dis-

cussion. The statement of Mr. Montgomery accords with our own views as they have been expressed in this opinion. The payment of \$999 would continue the option 90 days longer, and failure to pay the \$4,000 at the end of that time would terminate it. But the option which would be continued and the option that would be terminated was the option defined in the written contract, and no other.

Let the judgment be affirmed.

Affirmed.

GREAT WESTERN RAILWAY CO. v. BLADES.

(L. R. 2 Chancery Div. (1901) 624. Supreme Court of Judicature.
July 20, 1901.)

Private and statutory reservation distinguished. The principles governing cases like *Hext v. Gill*, (1872) L. R. 7 Ch. 699, which deal with a reservation of minerals by virtue of a grant or contract, are not applicable to the determination of cases arising out of a statutory reservation of minerals, like that contained in § 77 of the Railway Clauses Consolidation Act, 1845.

Clay—whether or not mineral. Though a mineral *prima facie* includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted only by virtue of a statutory reservation.

Clay forming the surface or subsoil and constituting "the land" purchased for the purposes of the undertaking is not a "mineral" within § 77 of the Railway Clauses Consolidation Act, 1845, as interpreted by *Lord Provost and Magistrates of Glasgow v. Farie*, (1888) 13 App. Cas. 657. The same clay may be a mineral in one district and not in another.

¹The text case, *Hext v. Gill*, 17 M. R. 1, *Murray v. Allred*, 19 M. R. 169, *Armstrong v. Lake Champlain Co.* 18 M. R. 279, *Johnstone v. Crompton*, 20 M. R. 649, *Phelps v. Church of Our Lady*, 115 Fed. 882; 22 M. R. —, with their notes and citations fully collect the authorities on the definition of "minerals." See also Lindley § 90-92. Snyder § 313, 964. White on Mines § 4.

As to mineral nature of gas and oil see *Manufacturers Co. v. Indiana Co.* 20 M. R. 672 and notes. *Marshall v. Mellon*, 18 M. R. 548. Donahue on Petroleum and Gas, 8.

Gravel and sand are minerals under the Quarries Act of 1894. *Scott v. Midland Ry.* 1 K. B. (1901) 317.

Construction of a deed holding that under its special incidents the word "minerals" was not intended to include coal. *White v. Sayers* 101 Va. 821; 45 S. E. 747.

A mineral is an inorganic substance having sufficient value to be dug or quarried for its own sake. *Hendler v. Lehigh Val. Co.* 209 Pa. 256; 58 Atl. 486.

Common sand is not a mineral. *Id.*

Action.

The only question raised by this action was, whether the clay under a piece of land at West Bromwich, purchased by a railway company for the purposes of its undertakings, was a "mineral" excepted from the conveyance by virtue of § 77 of the Railway Clauses Consolidation Act, 1845. The main facts were admitted, and were shortly as follows:

By an indenture of August 26, 1852, made between the predecessors in title of the defendants, therein described as coal and iron masters, of the one part, and the Birmingham, Wolverhampton and Dudley Railway Company of the other part, after reciting that the company in pursuance of the powers reposed in them by their act had contracted for the purchase, for the purposes of the said act, of the pieces of land and hereditaments thereafter described, and the inheritance thereof in fee simple in possession for the sum of £5500, to include "compensation for the costs of sinking a new coal pit, and the cost of a new Whimsey engine and plant for working the unwrought mines of the parties hereto of the first part," and for severance and injury done to the adjoining lands, some six acres of land, part of Swan Farm, West Bromwich, in the county of Stafford, were conveyed to the railway company, without any further reference to mines or minerals, for the purposes of their act, which incorporated the Lands Clauses and the Railways Clauses Consolidation Acts, 1845. The railway was carried over the land so purchased on a high embankment, along the top of which the permanent way was laid. The undertaking and the powers of the Birmingham, Wolverhampton and Dudley Railway Company were transferred to and vested in the plaintiff company, the Great Western Railway Company, as from April, 1853. The defendants were the owners of the lands adjoining that part of the Swan Farm that was conveyed in 1852, and also of the minerals under the land so conveyed,

and had recently commenced to excavate and work, by open workings, the subsoil and clay in their adjoining lands, and, having now reached the boundary of the plaintiff's embankment, had given the plaintiff company a proper notice of their intention to work the minerals under the railway pursuant to § 78 of the Railways Clauses Act. The plaintiff company did not, within the thirty days allowed them, state their willingness to make compensation, and thereupon the defendants threatened and intended to work the clay, and to enter and dig out and remove the same from the plaintiffs' land. The plaintiff company accordingly commenced the present action, and claimed an injunction to restrain the defendants from excavating the soil and clay in any manner likely to let down or injure the railway.

The action was tried with witnesses, and the result of their evidence as to the nature and quality of the clay was found by the Court as follows: The land in question lay within the district of the South Staffordshire blue brick clays, upon the top was a layer of vegetable or windblown deposit, made up of decomposed vegetable matter or ordinary surface soil, of a depth varying from nothing to about 2 feet. Speaking generally, its average thickness might be taken at from 6 inches to a foot. Immediately below this came the South Staffordshire clay. The uppermost 5 feet, or thereabouts, of this clay had become partially decomposed by exposure to weather, percolation of water, and the like, and was called by the witnesses "weathered"; below this came the unweathered or virgin South Staffordshire blue brick clay. Subject to some trifling strata of sandstone which lay within it, this clay extended to a considerable depth, some 300 or 400 feet or more. The top 5 feet of weathered clay was good for making ordinary red bricks, but would not, without admixture with other clay, make Staffordshire blue bricks: in working, it was usually ground up and mixed with the virgin clay of a lower stratum, and from this mixture

the Staffordshire blue bricks were made. The clay was admittedly of a valuable kind. The defendants alleged that it made the best blue bricks in the neighborhood.

NEVILLE, K. C., ASQUITH, K. C., and R. J. PARKER, for the plaintiff company. The present case is entirely within the decision of *Glasgow v. Farie*, 13 App. Cas. 657; true, that was a decision under § 18 of the Waterworks Clauses Act, 1847; but the wording of that section and § 77 of the Railways Clauses Consolidation Act, 1845, are identical. The clay in this case is practically "the land" on which the railroad runs. The surface minerals must either add to the value of the land at the time of purchase or not; if they do not add to the value, why is the railway paying the full value of the land not to have the surface minerals? If they do add to the value of the lands, why should not the landowner be paid for them at the time? In the present case the railway paid £5500 for six acres of land. True, some part of this was for compensation for a new coal shaft; but it cannot be supposed this large sum was paid for a mere easement over the surface, a defeasible right of way. Lord Macnaghten's judgment in *Glasgow v. Farie* is directly applicable to the present case. *The Midland Ry. v. Robison* (1889), 15 App. Cas. 19, does not touch the principle of *Glasgow v. Farie*; the only question there was whether the coal and limestone, which were wrought by open workings, were mines of minerals; and that case decided that "mines" included open as well as subterranean workings. *Midland Ry. v. Haunchwood Brick Co.* (1882) 20 Ch. D. 552, did not decide that "clay" was a mineral. It was assumed that clay was a mineral for the purposes of that case, the point being, whether it was a mine of a mineral; besides it was prior to the decision in *Glasgow v. Farie*, *supra*. The fact that the conveyance speaks of mines in connection with coal only, is of some assistance in determining whether clay was

intended to be included in the conveyance or not. The reference to the "unwrought mines" of the vendors did not include clay: until after *Midland Ry. Co. v. Haunchwood Brick Co.*, clay was not considered or claimed as a mineral: so that in 1852 there was no idea of reserving clay. Some weight should also be attributed to the amount of the purchase money in ascertaining what the railway really bought: here the clay is the surface, "the land" purchased: there is nothing but clay; the claim of the defendants amounts to a claim to be paid twice over.

WARMINGTON, K. C., and J. W. M. HOLMES, for the defendants. *Glasgow v. Farie* is the only case cited by the plaintiffs which is in favor of their contention; but that case has not been regarded as an authority upon the English statute. The circumstances under which the conveyance was executed in that case were considered important by Fry, L. J., in *Earl of Jersey v. Neath Poor Law Union* (1889) 22 Q. B. D. 555, 564, 565. The Lord Chancellor in commencing his judgment in *Glasgow v. Farie* expressly confines himself to the particular case before him under the Waterworks Clauses Act, 1847. In that case, too, the matter under discussion was clay under a reservoir, where the substratum of clay was all important; and the words in question had to be construed with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, having relation to Scottish land and Scottish mines and minerals; see per Lord Halsbury, 13 App Cas. 671. That decision is, therefore, not binding in a case where an English statute has to be considered. Lord Herschell's judgment is in favor of our contention that this clay is a mineral, and he makes no reservation between Scottish and English minerals or lands.

Errington v. Metropolitan District Ry. (1882) 19 Ch. D. 559. shows that railways can subsequently acquire the gravel

and clay underneath their lines, and is an instance of a railway company's own views of what are mines and minerals. The judgment of Fry, J., in *Loosemore v. Tiverton Ry.* (1882) 22 Ch. D. 25, which though reversed on appeal, was restored on this point by the House of Lords (1884) 9 App. Cas. 480, involves the question that clay is a mineral, and is in our favor. *Midland Ry. v. Haunchwood Brick Co.* involves the decision that clay is a mineral, as does *Midland Ry. v. Miles* (1885), 30 Ch. D. 634; (1886) 33 Ch. D. 632. Then there is *Earl of Jersey v. Neath Poor Law Union*, which, though a decision on the construction of a grant, is valuable for the observations on *Hext v. Gill* and *Glasgow v. Farie*. And the result of this decision appears to be this; the question that the Court has to decide in these cases is whether the thing the landowner proposes to work, whether by open or underground workings, is a substance which has a value of its own independent of its being a constituent part of the soil; if so, it is a mineral, and must be paid for. In construing a Waterworks Act the Court might well have taken into consideration the fact that the area of a reservoir is much less than a railway, and that clay is the most suitable substratum for an undertaking of that kind. *Ruabon Brick Co. v. Great Western Ry.* (1893) 1 Ch. 427, and *Johnstone v. Crompton* (1899) 2 Ch. 190, were also referred to. Here, therefore, are a series of authorities on the construction of the English Act which all recognize the principle that merchantable clay is a mineral, to which a railway company is not entitled as part of the land purchased unless it has been expressly conveyed to it, and that there is no difference whether the clay is actually on the surface or not. The defendants are, therefore, entitled to work this clay, or be compensated for not working it.

NEVILLE, K. C., in reply. The consideration of what is the meaning of mines or minerals in a grant is not of much

assistance in coming to a conclusion as to what was intended to be reserved by the statute in a reservation of mines and other minerals; this seems clear from *Glasgow v. Farie* and *Midland Ry. v. Robinson*. The principles of cases like *Hext v. Gill* do not, therefore, apply. It is stated by Lord Watson in *Farie's case*, 13 App. Cas. 674, that the legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries. No distinction can be drawn between the clay in *Farie's Case* and the clay in this. The defendants have failed to distinguish this case from *Farie's case*, to show that that case is not binding on this court, or to establish the proposition that clay of this character, which the witnesses say is the substance of the land itself, was reserved by the operation of § 77 of the Railways Clauses Consolidation Act, 1845.

Cur. adv. vult.

July 20. BUCKLEY, J. The decision in this case affects interests of far-reaching importance. It involves or may involve the determination as between the railway companies of this country on the one hand and the landowners from whom they purchased the soil on which their lines are laid on the other, of the question whether the clays which in many cases constitute or more or less closely underlie the soil have passed to the companies by the conveyance of the land, or are, by virtue of § 77 of the Railways Clauses Act, 1845, excepted. If they are excepted the landowner is entitled to get them, even by surface workings and destruction of the surface, unless the company, upon notice given, elect to purchase. In substance, therefore, the question is whether the value of these clays, or many of these clays (and it must be many millions sterling) belongs to the railway companies or to the vendors of lands to them.

Sect. 77 of the Railways Clauses Act, 1845, excepts from conveyances of lands made under a statutory purchase "mines of coal, ironstone, slate, or other minerals." The

question I have to determine is whether such clay as I shall have to describe in the present case is a "mineral." If it be, then an open working of that mineral from the surface, according to the usual manner of working in the district is a "mine of the mineral": *Midland Ry. v. Robinson*. A purchaser of the surface is by the common law entitled to support from the subjacent and adjacent strata. But, in cases falling within the fasciculus of clauses of the Railways Clauses Act, 1845, commencing with § 77, the statute has created a specific law, and by that alone are the rights of the purchasing company and the owner of the minerals regulated: *Great Western Ry. v. Bennett* (1867) L. R. 2 H. L. 27. It was decided in that case "that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface owner and the mine owner, and gives power to the mine owner to work his minerals unless the railway company purchases or gives compensation to the mine owner for leaving his mines unworked": Per Lord Halsbury in *Glasgow v. Farnie*, 13 App. Cas. 671.

The statutory law, as regards mines of minerals, which by § 77 are excepted from the conveyance, is that the company, until the mine owner is minded to work, enjoys support, and that when the mine owner is minded to work he must give notice, and the company may, if so minded, purchase the minerals. But if after notice the company does not purchase, then the mine owner may get the minerals, even though by so doing he lets down and destroys the surface; and this is not confined to subterranean workings, but extends also to open workings from the surface itself.

In *Hext v. Gill* the result of the authorities was stated by Mellish, L. J., to be that "a reservation of 'minerals' in-

cludes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Notwithstanding what has been said in a recent decision in the House of Lords in *Glasgow v. Faire*, to which I shall presently more particularly refer, it must be taken as concluded before me by the decision of the Appeal Court in *Earl of Jersey v. Neath Union* that *Hext v. Gill* has not been overruled, and that that case, where applicable, is as absolutely binding upon me as before *Glasgow v. Faire* was decided. The real question for my decision, I apprehend, is whether to the transaction with which I have to deal the rule in *Hext v. Gill* is applicable or not.

The task before me is limited I think to ascertaining the exact facts of the case with which I have to deal, and then endeavoring not so much to put a construction upon § 77 of the Railways Clauses Act, 1845, for myself as to endeavor to understand and state the true effect of the many decisions upon that section. They are not all of them easy to reconcile, and the more so in that they include differences of opinion upon cardinal points as between the learned Lords and learned judges of appeal who have taken part in their decisions. (Having shortly stated the conveyance of 1852, his Lordship continued:)

I am unable to accede to an argument advanced by the plaintiffs that the fact that this deed speaks of mines in connection with coal assists me at all in determining whether in this transaction clay is a mineral or not. The fact that the word "mines" in the language of this deed includes coal does not show that it excludes clay. Neither can I accede to an argument of the plaintiffs that, for the purpose of ascertaining what were the parcels as described in this deed, I can have regard to the fact that a large sum per acre (even allowing for the compensation which I have referred to) was

evidently paid. For the purpose of this decision I regard the conveyance of 1852 as being nothing but a conveyance of six acres of land (of the nature proved by the evidence) made under the statute, with all the consequences which ensue from a conveyance of that kind by the operation of § 77. (Having stated the result of the evidence as to the nature of the land, and the facts leading up to the commencement of this action, his Lordship continued:)

The whole question, therefore, is whether this clay is a mineral which, by virtue of § 77 of the Railways Clauses Act, 1845, was excepted from the conveyance of August 26, 1852; whether in fact it now belongs to the defendants, or whether it passed by the conveyance and now belongs to the plaintiffs.

After carefully considering all the authorities I have come to the conclusion that the proposition which lies at the root of the true solution of the question is that, to a case dependent as this is upon the operation of the statute, different considerations apply from those which arise in a case where the relations between the parties exist by contract or grant. The difference lies in the fact that where by way of grant land passes from A. to B. reserving the minerals to A., he, A., cannot so work the reserved minerals as to let down the surface, for that would be to destroy that what he has granted. In this case, therefore, there is no reason for withholding from the word "minerals" the widest meaning, because, be the meaning as wide as you will, the rights of B. are not affected seeing that A. cannot work the reserved things so as to injure B. But where the case is one under this Act of Parliament, that proposition is not true; for A. can work the excepted thing so as to injure B., and the whole basis of *Glasgow v. Farnie*, in arriving at the decision at which the House of Lords there arrived (without overruling—as the Court of Appeal have distinctly said their Lordships did not

overrule—*Heat v. Gill*), seems to me to lie in that proposition.

I find that this difference in the considerations applicable to the two cases has been repeatedly pointed out in the House of Lords. Thus, in *Great Western Ry. v. Bennett*, which may be said to be the foundation of all this branch of the law, Lord Westbury, L. R. 2 H. L. 41, after reading § 77, says: "In the face of these words there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." Lord Watson, in *Glasgow v. Farie*, speaking of *Menzies v. Earl of Breadalbane* (1822) 1 Sh. App. 225, which was a case of contract, says: "Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals coupled with an obligation to support the surface, and a reservation not only of the minerals, but of the right to work them without giving support." In the same case Lord Herschell, 13 App. Cas. 684, after pointing to similar considerations, says: "In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions." Lord Herschell, again, in *Midland Ry. v. Robinson*, 15 App. Cas. 19, 27, says: "I doubt whether much assistance is to be obtained from the cases in which a construction has been put upon that word '(mines)' in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of the question to permit it to be disturbed by winning

minerals which can only be wrought by surface operations. But in the case of mines reserved under § 77 of the Railways Clauses Act the case is different. It is clear that the mines reserved, if not purchased by the company, may be so worked as to interfere with the surface, the only limitation being that the working must be according to the usual manner of working such mines in the district where the same are situated."

It will occur to everyone that an argument might be advanced to the contrary of this of the following nature: In more than one of the cases the reasoning is adopted by the judges that the word "mines" in § 77 may very properly have attributed to it the widest possible meaning, because the railway companies are not necessarily injured, seeing that they can protect themselves by purchasing. (See e. g., *Midland Ry. v. Haunchwood Brick Co.*, *Midland Ry. v. Robinson*. A similar argument might be employed for the purpose of showing that "minerals" might, without injury to the railway companies, receive the widest possible meaning for the like reason. But though I have looked diligently to see whether any of the learned Lords who have dealt with this matter have accepted this argument, I cannot find that they have. On the contrary, from the passages which I have quoted, I am satisfied that the decisions include this as a proposition upon which I am entitled and bound to act, and which I think explains *Glasgow v. Farie* consistently with all the other cases—namely, that you are not to apply to a case where there is no right to support under the act the considerations which you are to apply where there is a right to support because the rights lie in contract.

The authority upon which the plaintiffs mainly rely, and which, in my opinion, governs the present case, is the decision of the House of Lords in *Glasgow v. Farie*. The defendants argued that the facts stated in the report at pages 659 to 661 from the pleadings, and the fact that the pur-

chasers there were a waterworks company, to whom from the nature of the case the clayey nature of the soil would be of importance for the purpose of retaining water, were circumstances which swayed the judgment of the House. I cannot accede to this argument.

I cannot in the judgment find a trace that any of their Lordships proceeded upon anything arising from those facts, or from the fact that the appellants' works were waterworks. No evidence was given in the case, and Lord Watson pointed out (13 App. Cas. 674) that the statements in the pleadings were unfortunately conflicting. The case was one of conveyance it is true, but of conveyance by reference to the statute, and the learned Lords dealt with it entirely as a case under the statute.

Thus Lord Halsbury (13 App. Cas. 669) says that the question is whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847. Lord Herschell says the issue depends entirely upon the construction to be put upon the statute in relation to the circumstances before the House, and Lord Macnaghten (686) says that the question must depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the Railway Acts. The defendants also urged that Lord Halsbury strictly limited his opinion to the case then before the House, and left himself wholly free if the question should arise with respect to any other statute, or with respect to any grant not controlled by the statute relevant in that case. But I cannot accede to the argument that by that observation the decision was, even so far as Lord Halsbury was concerned, confined to Scotland or to the Waterworks Clauses Act, 1847. Lord Halsbury dealt with it as a case depending on certain language in a statute, and identical language is found in this statute. Lord Watson said that the question would be precisely the

same if the purchaser had been a railway company and the statute an English statute. Lord Herschell (682) pointed attention to other statutes which contained the same words, and said that it was not to be supposed that the Legislature intended the same enactments in various statutes to have a different meaning, and Lord Macnaghten (686) called attention to the fact that the words of the Railways Clauses Act, 1845, are in this respect identical. The question the House determined, in my opinion, was this, that under the statute which was relevant there, and which is in identical words here, cases such as *Hext v. Gill*, dealing with grants are not of much assistance, and that, while the rule in *Hext v. Gill* is no doubt good law in circumstances to which it applies, the question under an act such as this involves other considerations. I am fortified in my view of the effect of the several decisions upon this vexed point by reading *Earl of Jersey v. Neath Union*. The judgments in that case show me, as I think, that the true principle to apply is that, accepting the decision in *Hext v. Gill* as being good law, and assuming that a mineral *prima facie* includes anything lying in the land which has a value of its own as being capable of being used independently of the land, yet that that rule must bend, as Bowan, L. J., said (22 Q. B. D. 562), or may be modified as Fry, L. J., said (565), by the circumstances of the case, and that what I must look to is to see whether in the nature of this transaction, and having regard to all the circumstances of this case, the word "minerals" does in the case now before me extend to include the clay in question.

I must also look to this, as Fry, L. J., says in *Earl of Jersey v. Neath Union*, "that in the construction of a statutory enactment intended to regulate the relative rights of a body of persons purchasing an interest in land for the purpose of constructing works, and the previous owner, it is reasonable to anticipate that the purchasers would acquire

such an interest in the surface as would enable the works to be constructed and maintained by the purchasers."

I wish it were open to me to adopt that which James, L. J., in *Hext v. Gill* said, but for the authorities, he would have thought was the right way to ascertain the meaning, and which Lord Halsbury in *Glasgow v. Farie* would evidently have desired himself to adopt, and to say that the meaning of the word is mere question of fact, to be determined like any other question of fact; but I do not feel that the authorities leave me at liberty to do this. It seems to me that I must ascertain the meaning upon the footing that mineral may, as in *Hext v. Gill* and in *Midland Ry. v. Haunchwood Brick Co.* include clay, but not that it must include clay, and that the question whether it does or does not is to be determined by ascertaining the true nature of the transaction and the object of the contracting parties. This, I think, is the fair result of *Glasgow v. Farie* and *Earl of Jersey v. Neath Union*. Mines and minerals, as Lord Watson says (13 App. Cas. 675), are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used.

In this state of things I do not find much assistance from that which was said by Sir George Jessel in *Errington v. Metropolitan Dist. Ry.*, 19 Ch. D. 559, 571, or by Fry J. in *Loosemore v. Tiverton Ry.*, 22 Ch. D. 25, 42, or from *Midland Ry. v. Miles*, 30 Ch. D. 634; 33 Ch. D. 632, where I find that the company did not argue that clay was not a mineral, or, as Lord Watson said in *Glasgow v. Farie*, even from *Hext v. Gill*. As regards *Midland Ry. v. Haunchwood Brick Co.*, I may say that the decision, as I read the case, was not really one that clay was a mineral, although that was involved in the decision, but was that surface workings of clay (assuming clay to be a mineral) were mines of that mineral. *Ruabon Brick Co. v. Great Western Ry.* (1893) 1

Ch. 427, is but an application of *Midland Ry. v. Robinson*, to its own peculiar facts.

It remains to solve the question, therefore, upon the facts of this particular case. Now the facts here, concisely stated, seem to me to be that this clay is the soil. The six inches or so of decomposed vegetable matter on the surface is not in this place the soil any more than in a room the carpet can be said to be the floor. The plaintiffs' witnesses (I may instance Professor Lapworth and Mr. Whitaker as instances, but in fact they all say the same thing) say that these clays are in this district the land, and the figures which the defendants' witnesses give in stating the different strata of the ground lead irresistibly to the same conclusion. It is impossible to read the speeches in *Glasgow v. Farie*, without seeing that it may well be, consistently with that decision, that the same clay may within that decision be a mineral in one district and not in another. Thus Lord Watson (13 App. Cas. 679) after suggesting that it may be possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but be reserved if they occurred some depth below it, goes on to say that the expression "the land," being that which the company purchases, cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes and must be held to include the upper soil, including the subsoil, whether it be clay, sand or gravel. And Lord Macnaghten (698) points to similar considerations as affording an answer to the question of what it is that the company have bought. Where the clay is what Lord Halsbury calls the stratum on which the house is built (669), or constitutes "the land," as Lord Watson describes it (679) it is not, I think, a "mineral" within the act as the act has been construed by the decisions. It is a thing which has a value of its own, but not a thing which has a value of its own apart from the soil in which it is found, for the simple

reason that it is itself the soil. At the commencement of this judgment I stated that in my view I cannot, for the purpose of construing the description of the parcels in the deed of 1852, regard the fact that the company paid so many hundred pounds per acre, but I think I can regard it as a factor to enable me to answer, in connection with all the other facts, the question as to what was the nature of this transaction. Is it possible in this transaction that the railway company should have bought and paid so large a sum for the mere right of an easement over the surface (for that is practically what it is), with a right of support so long as the clay is not worked and a right of pre-emption of the soil, that is the clay, when it is worked, and how could you (to apply Lord Macnaghten's words) value this land at Swan Lane at so much per acre when by the hypothesis you are to separate the land for the purpose of valuation from the ordinary constituents of which it is in fact composed, and which are in substance the whole of the land itself? I am very conscious of the difficulty of the case, but I have arrived at the conclusion, for the reasons that I have stated, that the plaintiffs are right. I think that in this transaction, and having regard to the nature of this land, the clay was not a mineral reserved by force of section 77 of the Railways Clauses Act, 1845, and that the plaintiffs are entitled to an injunction and the costs of the action. I desire to add an expression of my gratitude for the very great assistance which counsel gave me in the argument of this case. If, in considering the authorities, I have overlooked or paid insufficient attention to any consideration which I ought to have given weight, the fault is due to my own imperfection, and not to any want of assistance from the counsel who argued the case before me.

(His Lordship accordingly made a declaration that the clay was not a "mineral" within the meaning of the Act of 1845, and granted an injunction to prevent excavation except

for the purpose of getting minerals, such injunction to be without prejudice to the defendants' rights under section 77 of the act.)

Solicitors: R. R. NELSON; NEEDHAM, TYER & BARROW,
for E. Caddick, West Bromwich.

E. A. STEPHENS ET AL. V. FREDERICK WOOD ET AL.

(39 Oregon 441; 65 Pac. 602. Supreme Court. July 15, 1901.)

¹A return or offer to return the consideration paid, must be made before a party is entitled to rescission.

²Trustee deciding doubts against his beneficiary. A trustee took conveyance of about 260 acres of placer ground under agreement to apply for patent. Upon issue of the patent the purchase price of the tract was to be paid over, the trustee taking the deed only as a means to perfect the title. He applied and got the patent omitting from the application one claim of 15 acres, believing the location of that claim to be void. *Held*, that in a doubtful case the trustee was bound to make application and let the Land Department decide, and that the vendor was entitled to the money in full the same as if the trustee had secured patent on such 15 acres.

Appeal from Circuit Court, Baker County.

ROBERT EAKIN, Judge.

Action by E. A. Stephens and another against Frederick Wood and others. From a judgment for defendants, plaintiffs appeal. Reversed.

¹See notes to *Barnard v. Roane Co.* 17 M. R. 94.

Tender of price need not be made on date named when vendor is not ready to pass good title. *Wheeling Co. v. Elder*, 54 W. Va. 335; 46 S. E. 357.

Deposit money paid on sale of furnace treated as liquidated damages to vendor. *Garcin v. Penn. Co.* 186 Mass. 405; 71 N. E. 793.

Vendor seeking to set aside an option contract by Bill to Quiet Title is not bound to refund or offer to refund a part payment received. *Merk v. Bowery Co.* — Mont. —; 78 Pac. 519.

Contract for sale of coal land construed with the holding that no tender of price need be made with the notice of acceptance. *Pa. M. Co. v. Martin*, — Pa. —; 59 Atl. 436.

²Presumption that trustee has no power to sell the subject matter of the trust. Share of stock held by A. B. Trustee is notice that some beneficiary must assent to its transfer. *Geyser Co. v. Stark*, 21 M. R. 220.

On July 6, 1896, the plaintiffs entered into a written contract with the defendant Wood whereby they agreed to sell and convey to him about 260 acres of unpatented mining land and other property for which they had contracts of purchase, together with certain water rights, for the sum of \$50,000. The deeds of the property were to be placed in the possession of the Farmers' & Traders' Bank of Lagrande, to be held by it as an escrow until September 1, 1896, and then delivered to Wood or his assigns upon the payment to the plaintiffs of \$25,000 in cash, and the execution and delivery to them of a mortgage on the premises to secure the payment of a promissory note for the balance on or before September 1, 1897. Subsequently, and before the first payment became due, the contract was modified by reducing the purchase price to \$40,000, extending the time of the final payment to December 1, 1897, and inserting a guaranty on the part of the plaintiffs that the ground would yield at least 10 cents per cubic yard. The first payment was thereupon made, the deeds delivered to the bank as agreed, and Wood entered into possession of the property, which he and his assigns have ever since retained. The mortgage to secure the deferred payment not having been executed, the deeds in escrow were not delivered. Before the second payment became due, some question arose in relation to the performance of the contract, its proper construction, and the title to the property. On June 18, 1897, by agreement, the plaintiffs and their attorney met the attorney in fact of the defendant Wood, and C. A. Johns, his legal adviser, for the purpose of adjusting their differences. After considerable preliminary negotiation, it was finally agreed, as a basis of settlement, that the balance of the purchase price should be reduced from \$20,000 to \$13,500, and, in order to clear up the title, that the property should be conveyed to Johns, as trustee, who should purchase and acquire, upon terms satisfactory to the plaintiffs, acquittances and conveyances from certain adverse

claimants with the \$11,500 which Wood agreed to advance to him as a part of the amount remaining due the plaintiffs on the purchase price of the property, and should also "proceed at once to take the necessary steps to apply for a patent to all the mining property described" in the deed to him and in the contract of July 6, 1896, between the plaintiffs and Wood, "and prosecute the said application with diligence"; Wood or his assigns to "advance on demand all moneys or expenses that may be necessary or required to further and promote such patent proceedings." It was further agreed and stipulated that the balance of the \$13,500, over and above the advancement by Wood to Johns for the purpose of acquiring outstanding titles and water rights, should not be due and payable to the plaintiffs "until such time as a final receipt shall be obtained from the U. S. land office to the placer mining ground described in said deed, and until the said outstanding titles shall be conveyed to the trustee; and when such final receipt is obtained, and such conveyances are made, then and in that event the balance of the \$13,500 shall become due and payable."

The property was accordingly conveyed by the plaintiffs to Johns, and Wood advanced \$11,819.25, which was used in purchasing outstanding titles and water rights, under the direction and with the approval of the plaintiffs. Johns also applied, according to a description prepared by a deputy United States mineral surveyor, for a patent to the mining land, Wood paying the expenses thereof. The surveyor, however, on his own motion, omitted from the description 15 acres of the land described in the contract of sale between plaintiffs and Wood, because he thought a location by the plaintiff Brice of one 20-acre tract, known in the record as the "unnamed claim," was invalid on account of a failure to conform to legal subdivisions. This omission was not discovered by or known to the trustee or any of the parties until after the publication of notice of the application. As soon

as the error became known, the plaintiffs and Wood's representative immediately insisted that the trustee should apply for a patent to the omitted tract; but no such application was made, because neither party would do the work necessary to patent it apart from the entire tract. After the outstanding title had been acquired by the trustee, and the certificate for a patent received by him for all the lands except the 15 acres, the plaintiffs demanded payment of \$1,680.75, the balance due on the purchase price. Wood refused to make such payment, but deposited the amount with defendant Johns to abide the settlement of the dispute between him and the plaintiffs. This suit was thereupon commenced to compel the trustee to reconvey the property to the plaintiffs, or for such other relief as might seem just and equitable. The court below held that the patenting of the land was a condition upon which the final payment was to become due, and that the trustee's failure to obtain a patent for the 15-acre tract was not the fault of Wood or his assigns, and entered a decree dismissing the complaint, from which the plaintiffs appeal.

W. T. SLATER and J. D. SLATER, for appellants.

J. L. RAND, for respondents.

BEAN, C. J., after stating the facts, delivered the opinion of the court.

1. It is apparent that plaintiffs are not entitled to the full relief demanded in their complaint. Before they could rescind the contract and compel a reconveyance of the property, they must return, or offer to return, the money received by them on the contract.

2. The only question in the case, then, is whether the plaintiffs are entitled to the balance of the purchase price now in the hands of the trustee. The contract of July, 1897,

provides that such payment shall not become due until a certificate for a patent to the mining land shall be received by the trustee. As no such certificate has been received by him for the 15-acre tract, it is clear that plaintiffs cannot recover unless the failure to obtain it was due to the fault or negligence of the defendants. The argument in support of the decree of the court below is that the 15-acre tract was not located as a mining claim according to law, and therefore the failure of the trustee to include it in his application for a patent worked no hurt or injury to the plaintiffs. If this position is sound, the decree should be affirmed. If, however, the validity of the location is open to serious controversy, the question was for the determination of the United States land department, and not for Wood or the trustee. The agreement was that the trustee, the attorney and legal adviser of Wood, should immediately apply for a patent to all the mining ground, and should diligently prosecute such application, Wood or his assigns to advance all moneys or expenses necessary or required therefor, and was, in effect, the same as if the property had been conveyed directly to Wood, under an agreement that he should, at his own cost and expense, immediately apply for a patent to the land. Unless, therefore, it was clearly apparent that an application would be futile because of the invalidity of the location, it was the duty of the trustee and Wood to proceed under the contract, and their failure to do so affords no excuse for the non-payment of the balance due on the contract of purchase. Now, in the notice of location of the "unnamed claim," it is described as follows:

"Beginning at a point 300 feet west and 1,320 feet south of $\frac{1}{4}$ corner between secs. 32 and 33, T. 10 S., R. 46 E., W. M., and runs 2,640 feet north, thence 360 feet west, thence 2,640 feet south, thence 360 feet east to place of beginning, containing 20 acres."

The statute of the United States provides that legal sub-

divisions of 40 acres may be subdivided into 10-acre tracts (Rev. St. U. S. § 2330), and that placer claims on surveyed lands must conform as near as practicable to the legal subdivisions. By such legal subdivisions, the description in the notice of location of the "unnamed claim" would cover the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32, and also a strip 30 feet wide, extending north and south along the east side of these two subdivisions; in other words, the location as made conforms in all the exterior lines to the legal subdivisions, except the east boundary includes 30 feet of the adjoining subdivisions. The error evidently occurred through making the beginning point 300 instead of 330 feet west of the east line of section 32. There is nothing in the pleadings or evidence to indicate that the location of the mining claim was not made by Brice in perfect good faith, and there is authority for the contention that it is not void because more land is covered thereby than he was entitled to take. *Richmond M. Co. v. Rose*, 114 U. S. 576; *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Jupiter M. Co. v. Bodie M. Co.*, 11 Fed. 666; *Stem-Winder M. Co. v. Emma & Last Chance M. Co.* (Idaho), 21 Pac. 1040; *Hanson v. Fletcher*, 10 Utah 266, 37 Pac. 480. But we deem it unnecessary to pass upon that question. It is sufficient that the location was not clearly void. Under the contract, it was the trustee's duty to apply immediately for a patent to the land, and, at Wood's expense, to prosecute such application with reasonable diligence; and that the result would have been doubtful is no excuse for a failure to undertake it. It is to be remembered in this connection that plaintiffs did not agree to sell patented claims, nor was the obtaining of the patent a condition precedent to the final payment. Of course, their contract must be understood as stipulating that they were the owners of the property, and entitled to sell and convey the same, but there was no agreement that they

should obtain patents therefor. The application for the patent was to be made by the attorney for Wood, at the latter's expense and for his benefit; and the provision in reference to the matter in the contract of July 19, 1897, was intended to fix the time of the final payment. If the trustee, according to the terms of the contract, had applied for a patent to the 15-acre tract, and it had been denied, defendants would, no doubt, have been entitled to redress on account of the failure of title to a part of the land purchased by them. But the defense in this suit is not based on a failure of title, but upon the theory that, because the plaintiffs did not amend their location notice so as to make the "unnamed claim" conform to the legal subdivisions, the patent could not be obtained, and therefore the balance of the purchase price is not due. The answer further pleads a breach of the stipulation in the contract of purchase and sale that the ground would yield 10 cents minimum per cubic yard. The plaintiffs allege that this provision of the contract was waived at the time of the settlement in July, 1897. But, however that may be, no evidence was offered or given on the trial showing a breach of the contract, or from which the court could determine the damages, if any, sustained by the defendants on account thereof. We conclude, therefore, that plaintiffs are entitled to a decree requiring the defendant Johns, as trustee, to pay over to them the balance on the purchase price of the property, and against the defendants Wood and the Flick Bar Placer-Mining Company for their costs and disbursements.

Reversed.

LAWRENCE RAMUS ET AL. V. CHARLES E. HUMPHREYS.

(165 Pacific 875. Supreme Court of California. July 24, 1901.)

²Title of third party when immaterial. Where the plaintiffs in a suit to quiet title to a mining claim had been in actual possession for a number of years, a defense that a claim prior to plaintiff's had never been abandoned cannot be urged, the defendant not claiming title under such prior claimant; Civ. Code, § 1006, providing that occupancy for any period confers title except as to those claiming by prescription, transfer, will, or succession.

Commissioners' decision. Department 1. Appeal from Superior Court, Siskiyou County.

J. S. BEARD, Judge.

Suit by Lawrence Ramus and others against Charles E. Humphreys to quiet title. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

WARREN & TAYLOR, for appellant.

J. F. FARRAHER, J. F. LODGE, and J. D. FAIRCHILD, for respondents.

¹Not officially reported.

²It is sufficient on bill to quiet title, to allege ownership without setting out the title in detail. *Souter v. Maguire*, 78 Cal. 543; 21 Pac. 183.

Construction of complaint held to make a case for quieting title. *Parley's Park M. Co. v. Kerr*, 17 M. R. 201.

Plaintiff bought from A. Before payment he heard that B. held title and brought bill against B. to disclose his title; *held*, that bill would not lie. *Sulphur Co. v. Boswell*, 94 Va. 480; 27 S. E. 24.

Lessee taking leases from two adverse claimants cannot compel them to interplead. *Standley v. Roberts*, 59 Fed. 836.

The rule that plaintiff in ejectment must recover on the strength of his own title does not prevail in actions between possessory claimants. *Strepey v. Stark*, 17 M. R. 28.

See *Crown Point Co. v. Crismon* and notes, 21 M. R. 406.

SMITH, C. The plaintiffs sued to quiet title to the mining claim described in the complaint. From the special verdict, adopted by the court, it appears that the land in controversy, at the date of the act of congress granting to the state the sixteenth and thirty-sixth sections, and at the date of the approval of the United States survey, was mineral land, and known to be such; that the plaintiffs or predecessors made a valid location of it May 7, 1893, and have ever since been, and now are, in possession of the land; and that the defendant afterwards—April 19, 1894—made an attempted location of a portion of the land, but the same was invalid. It is further found that one Hicks made a valid location of part of the claim January 3, 1893,—which was prior to plaintiffs' location,—but that before the latter event he abandoned the claim. The defendant, it appears, afterwards obtained a patent from the state purporting to grant certain government subdivisions, which included the land, but it is, in effect, admitted that the patent conveyed no title. *Hermocilla v. Hubbell*, 89 Cal. 5, 26 Pac. 611. The sole point made in the case is that the finding as to the abandonment of the mining claim by Hicks is not justified by the evidence. This, however, is a point that cannot be successfully urged by the defendant, who does not claim under Hicks. The plaintiffs were in the actual possession of the land when the suit was commenced, and had been for many years; and this, as against the defendant, who had no title, was sufficient to maintain the action. Civ. Code, § 1006. I advise that the judgment and order denying the defendant's motion for new trial be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying the defendant's motion for new trial are affirmed.

HENRY YORK V. C. T. DAVIDSON ET AL.

(39 Oregon 81; 65 Pac. 819. Supreme Court. July 29, 1901.)

¹**Impounding dams.** Where the debris from hydraulic mining accumulates to the destruction of agricultural lands below such mining will be enjoined but with leave to defendants to erect impounding dams such as will allow the mining to continue without injury to the lower proprietors.

Appeal from Circuit Court, Josephine County.

H. K. HANNA, Judge.

Bill by Henry York against C. T. Davidson and others to enjoin the operation of defendants' mine. From a decree granting the injunction, defendants appeal. **Affirmed.**

H. D. NORTON, for appellants.

GEO. W. COLVIG, for respondent.

WOLVERTON, J. Defendants are engaged in placer mining by the hydraulic system in Taylor's gulch, a tributary of

¹*Columbus Co. v. Tucker*, 48 Oh. St. 42; 29 Am. St. R. 528; 12 L. R. A. 577. *Mississippi Co. v. Smith*, 69 Miss. 299; 30 Am. St. R. 546. *Price v. Oakfield Creamery*, 87 Wis. 536; 24 L. R. A. 333. *Drake v. Lady Ensley Co.* 102 Ala. 501; 24 L. R. A. 64. *Elder v. Lykens Co.* 157 Pa. 490; 37 Am. St. R. 742.

Hydraulic mining in California prohibited by Act of Congress, except under drastic regulations. *U. S. v. N. Bloomfield Co.* 81 Fed. 243. Validity of the Act sustained. *N. Bloomfield Co. v. U. S.* 88 Fed. 664.

Tailings, injunction against. *Carson v. Hayes*, 39 Oreg. 97; 65 Pac. 814.

Respective rights of upper and lower mills. *Otaheite Co. v. Dean*, 20 M. R. 688.

See *Strobel v. Kerr Salt Co.* and notes, 21 M. R. 38.

a stream which traverses a portion of plaintiff's land, known as "Carris Creek"; the necessary water, aside from that contained in the gulch, being carried to it from Rocky creek, Miners' creek, and Carris creek by means of ditches. The two creeks first named also discharge into Carris creek, and all these streams, including Miller creek, flow more or less through a decomposed granite formation. The point of operation is located two miles above the lands of the plaintiff, and at an elevation of about 300 feet. The defendants have been using a giant for some three or four years, and, to prevent the tailings and debris from their mine from being carried below, they built two impounding dams in the gulch, and recently constructed a by-wash around the lower dam, by cutting a channel along the side hill above the deposit, so that the water might flow down the gulch without disturbing the deposits. Later, Miller and Savage connected their ditch with the by-wash, by means of which the water from the mine is conveyed across by the head of Rocky creek and its tributaries into Miller creek. This latter stream intersects another portion of the plaintiff's premises, and is utilized for irrigation purposes. The plaintiff alleges that the defendants have been discharging large quantities of gravel, silt, sand, and other debris into Taylor's gulch, which has been carried into Carris creek, and has caused the bed of the stream to fill up and to overflow its banks where it traverses the plaintiff's land, and to cast such refuse matter thereon, thus destroying it for the purpose of agriculture, for which it is adapted, and prays that they be enjoined from casting and discharging any sand, silt, or other refuse matter from their mine into Carris creek or its tributaries, or into Miller creek, whereby the same may be washed or carried upon his premises, and from impounding the water in any manner so as to interrupt its flow across the same. The plaintiff having obtained a decree in his favor, the defendants appeal.

The defendants seem to concede that the plaintiff has been

injured materially by the washing of granite sand upon his premises along the course of Carris creek, but they seek to account for it through causes other than such as were superinduced by their acts. (1) They say that an unusual freshet which occurred in the early part of 1890 was the principal cause; (2) that the plaintiff and his agents have so obstructed the stream, by felling trees and constructing dams across it, as to divert the water from its natural course, and thereby to overflow its banks; and (3) that the deposits may be accounted for almost entirely, if not wholly, through natural erosion by the elements, and the operations of mines along Carris creek and its tributaries by persons other than the defendants. They further contend that their impounding dams are permanent and durable structures, of sufficient capacity and efficacy to securely impound the tailings, sand, and débris from their mine, and to discharge the water therefrom down the gulch reasonably pure and free from such deleterious matter. Beyond this, they assert that, after the water is discharged from their mine into Taylor's Gulch, it is taken up by the ditch of Miller and Savage, and carried into Miller creek. Of these in their order.

Peter Burkhalter and John Gentner began mining early in the 60's on Miner's creek, a tributary of Carris creek, which was continued by one or both of them from time to time, covering a period of 30 years. The tailings from their mine were discharged into the stream, and were carried upon the land of the plaintiff to such an extent that in January, 1886, he instituted a suit against them to prevent further operations to his damage. This resulted in an agreement on the part of Burkhalter and Gentner to construct a new channel through the plaintiff's field, and keep it open and in good order, so that the mining débris would be carried past his premises, and to be responsible for any damage that might ensue by reason of their dereliction. Early in 1890 there came a freshet carrying the sand and débris down Carris

creek in such quantities as to fill up the new channel and overflow the plaintiff's lands, covering a considerable tract with the deposit, thereby rendering it unproductive. Of this Mr. York made complaint, and the matter was arbitrated, and Burkhalter and Gentner paid the damages assessed. Shortly thereafter they concluded their mining operations, and sold their ditch to the defendants, and it now constitutes one of their sources of water supply. After the new channel constructed through the plaintiff's field had become obstructed by the freshet of 1890, the plaintiff built a dam across it at its upper junction, with a view to turning the water of the creek back into the old channel, deeming it the better outlet; and this, together with the felling of some trees and filling in with brush along the margin, for the purpose of confining it within the channel, constitutes, in substance, all that the plaintiff has done in the way of damming up the stream and flooding his own land. What he did, so far as we are able to discover from the evidence, tended to retard, rather than to precipitate, the flow of the water beyond the banks of the stream.

It has been shown quite clearly that since the defendants have been engaged in hydraulic mining on Taylor's gulch a decomposed granite sand has been deposited by the action of Carris creek upon plaintiff's land along its course, and in such quantities as to very materially enlarge the area previously covered, resulting in further damage to him. This enlargement is estimated at 1 1-5 to 5 or 6 acres. Now, we may inquire whether this later deposit came from the defendants' mine, or may be accounted for through the natural erosion of the elements and the mining operations of other persons. Specimen exhibits of the sand found upon the land of the plaintiff and that taken from the impounding dams have been offered in evidence, bearing a marked resemblance one to the other. Very little weight can be attached to this circumstance, however, as other specimens have been pro-

duced, coming from Miners' creek, Mahalley creek, Rocky creek, all discharging into Carris creek, resembling these very closely. But there is evidence of the fact of a more convincing character. Mr. Wright testifies that he traced the sand up Carris creek to Taylor's gulch, and thence up the gulch to the dam; that above the junction of Taylor's gulch there was little or no sand discoverable in Carris creek; and that apparently all of it came down the gulch. Several other witnesses testify also to having traced the deposit to the same source. J. W. York, brother of the plaintiff, whose land adjoins his brother's, and through which Carris creek flows, testifies that during the winter, previous to the institution of this suit, sand came down from the defendants' mine every time they turned off a reservoir head, and that at one time their dam broke, and it came down in such quantities as to fill up the creek along the road by his dwelling for the space of 200 or 300 yards, and much of it was washed out upon the plaintiff's land. And W. B. York, son of the plaintiff, testifies that he has observed the sand as it was being carried down Carris creek and upon the land of the plaintiff while the defendants' mine was in operation, and at the time the dam broke there was a large increase of the deposit. Miller and Savage are the only persons besides the defendants engaged in hydraulic mining above the plaintiff. Their mine is located upon Miller creek, and the tailings therefrom have been so disposed of that none of them have as yet been carried down the stream. The only other mining shown to have been done on Carris creek or its tributaries in the meanwhile was by H. L. Hansen and Frank Bailey. Hansen was engaged for a time on Carris creek, removing some old tailings, and just prior to the institution of this suit was mining by the ground-slucing process in Taylor's gulch, immediately below the lower impounding dam of the defendants. Débris from his mine on Carris creek was cast into the stream and carried down, but

not from that operated in Taylor's gulch, as he was working there in rock and gravel. He relates that, at the time defendants' dam broke, the tailings came pouring down in great quantities, and covered up his works. Bailey mined some in Taylor's gulch in 1897, but not extensively. Aside from this, there may have been a little mining done on Rocky creek. But these mining operations were not sufficiently extensive to account for the added accumulation of the sand and débris upon the plaintiff's land, nor is the natural erosion by the elements adequate for the purpose. There has been considerable mining on Carris creek and its tributaries in earlier days, but the débris therefrom has become so compact and solidified by lapse of time that the elements have no greater effect upon its disintegration and precipitation down the water courses than on the natural formation of the country.

With a view to retaining the tailings, sand, and débris from their mine, and preventing them from being carried down the gulch into Carris creek, the defendants have constructed two restraining or impounding dams across the bed of the stream and gulch. The one first built (being the lower dam) was constructed by felling a large tree 3 or 4 feet in diameter across the channel. Smaller logs, from 8 to 15 inches through, were stood up against this, with the lower ends imbedded in the bottom of the creek. Other smaller timbers were used for carrying it up, some being placed lengthwise, and others crosswise, of the stream, and brush filled in along with these, so as to make the structure compact. The dam was built up as it filled with tailings and débris, the idea being to keep it somewhat above the tailings, so that the water would form a pond, and be drawn off gradually by percolation through the brush, and thus allow whatever sediment was carried down to settle therein before the water would be liberated. The upper dam was built of small trees cut and thrown in across and lengthwise of the stream,

and filled in with brush as it was carried up. In dimensions, the lower dam is $16\frac{1}{2}$ feet high, and 160 feet across from bank to bank, and the deposit extends up the stream for the distance of 270 feet or more, containing about 30,000 tons. The dimensions of the upper dam are not given, but both are carrying all the tailings they will hold. That these structures have not prevented the sand and other sediment from passing down the gulch in quantities sufficient to injure the plaintiff is manifest from what mention has been made of the testimony heretofore. On February 28th, prior to the institution of this suit, there was a breach in the lower dam, caused by a slight freshet. This was of such proportions as to allow the water and débris to discharge beneath the large tree used in its construction, and large quantities of the deposits were carried out and down the gulch. It is estimated that from one-twentieth to one-fourth of them were thus carried away. This breach induced the construction of a by-wash in the hillside around the dam for the purpose of carrying the water by without contact with the deposits. A little later Miller and Savage connected their ditch with the by-wash, which ordinarily draws off all the water entering it.

There is a controversy as to whether Taylor gulch may be deemed a torrential stream. That it is a natural water course, there can be no doubt. It is from $2\frac{1}{2}$ to 3 miles in length, has a regular channel, is fed by a watershed formed by the hills on either side, and carries water during the rainy seasons. As described by one of the witnesses, sometimes during the rainy seasons there is very little water in it, while at others, when the snow is melting or there is a freshet, it carries from 1,500 to 2,000 inches. Another witness testifies that he saw it in 1890 above the defendants' mine, and there was a large amount of water in it,—so much that it would have been dangerous to cross it with a horse. About this there is a contrariety of opinion. Other witnesses say that during heavy freshets it does not carry more than an

ordinary pipe head, such as was being used at the mine. But, from what we may legitimately infer, the stream is probably of such character that when conditions are favorable water is precipitated through its course in considerable volume and with much force. Whether it falls within the category of a torrential stream is not necessary for us to determine. Enough has been shown to convince us that the system employed by the defendants for impounding the tailings and débris from their mine within the gulch is not effective for the purpose, and that the dams are so constructed that they are unsafe and insecure, especially in times of freshets, and are liable to give way and precipitate their contents upon the land of the plaintiff, and for this reason their use should be discontinued. The testimony is conflicting touching the capacity of Miller's and Savage's ditch to carry all the water from the mine. Ordinarily it will, but in times of freshets it is probably insufficient for the purpose. But, be this as it may, there is evidence that a large amount of sediment from the mine is carried into it, and, if allowed to continue, will be borne upon the lands of the plaintiff, through Miller creek, and will serve to increase his injuries.

The decree of the court below restrains the defendants from in any manner casting or discharging any waste or refuse matter from their mining operations into Carris or Miller creek, or impounding the same at any point above the plaintiff's premises. This decree should be affirmed, except that defendants should be allowed to impound their tailings and débris in Taylor's gulch, or elsewhere, as convenience may suggest, when they shall have adopted and constructed an efficient and durable system or device for the purpose, such as will meet with the approval of persons skilled in such matters and the court. In support of these conclusions, see *U. S. v. North Bloomfield M. Co.* (C. C.), 53 Fed. 625, and *U. S. v. Lawrence*, Id. 632.

Let the decree be entered accordingly.

Modified.

P. W. OBER v. D. H. SCHENCK ET AL.

(23 Utah 614; 65 Pac. 1073. Supreme Court. July 30, 1901.)

Superintendent ordering lessee to quit. Plaintiff took a lease from defendant company, the lease providing for surrender of possession in case of sale or transfer of the property. After the lessee had struck pay ore, the superintendent falsely told him that the mine was sold and to quit the premises, which he did. *Held*, that plaintiff was justified in relying on the notice received.

¹Where the company refused to reinstate on demand, it assumed the consequences of the superintendent's unauthorized act.

"Sale or transfer." A transfer under such clause means a transfer of title, not a transfer of possession, and does not cover a mere option to purchase with right of possession during option.

Exceptions taken outside of the court room by leave of the court though without consent of opposing counsel are irregularly taken and will not be considered.

Appeal from District Court, Salt Lake County.

A. N. CHERRY, Judge.

Action by P. W. Ober against D. H. Schenck and another. From a judgment for plaintiff, defendants appeal. Affirmed.

From the record in this case it appears that on the 13th day of December, 1899, plaintiff and defendant Dalton & Lark Gold, Silver & Lead Mining & Milling Company entered

¹A party cannot accept the benefits of an agent's act and repudiate his authority. *Genter v. Conglomerate Co.* 23 Utah 165; 64 Pac. 362.

Where a licensee or tenant "jumps" the property he loses his right to plead the license or lease as a defense to his trespass. *Brash v. White* 3 Ariz. 212; 73 Pac. 445.

A lessor is not bound to defend his lessee against an apex suit and a promise to repay the lessee's outlays unless the suit is won is without consideration. *McMillan v. Frank*, — Mont. —; 75 Pac. 685.

into a written contract, executed by the defendant Schenck as the mining company's superintendent, whereby the defendant company leased to plaintiff a certain mining claim for the term of six months. One of the provisions of said lease is as follows: "It is hereby agreed by and between the said parties, should there be a sale or transfer of said property at any time during the life of this lease, the said party of the second part [the plaintiff] will surrender said property, and this lease shall be null and void." Pursuant to his lease, plaintiff worked the mine for some time, and about December 23d struck ore, and made one shipment about January 6th or 7th following, netting plaintiff about \$800, after deducting freight, expenses, and royalty, the payment of which amount was made on January 11, 1900, to plaintiff, by the defendant company, at its office in Salt Lake City. Upon the return trip to his mine the next morning, defendant Schenck came to plaintiff upon the train, and told him that the Dalton & Lark property had been sold, or changed hands, and requested him to clean up what ore he had and quit work on the property. Plaintiff, believing the statement to be true, quit his work, discharged his men, and shipped the remaining ore after the clean-up, which latter netted him about \$185.

It further appears from the record that on the 11th day of January, 1900, the defendant mining company gave an option to one P. T. Farnsworth upon certain mining property, including the claim leased by plaintiff; that by the provisions of such option agreement Farnsworth was to have immediate possession of the property, and was to pay the defendant mining company \$300,000 in several installments, covering a period of about 10 months. The option further provided as follows: "This agreement is an option, and it is also agreed that if any payment herein provided for shall not be made when due, and shall be in default for 30 days, then this contract shall become forfeited, and all payments

theretofore made shall be forfeited to said party of the first part, and all rights hereunder of the said party of the second part shall revert to said party of the first part as liquidated damages. * * * But it is distinctly understood and agreed between the parties hereto that said party of the second part does not bind himself to pay for said property, but that he has the option to pay for the same or not, as he may elect." After paying some \$14,000, Farnsworth defaulted in the further payments, and on August 29, 1900, the agreement was canceled. At the time of taking the option Farnsworth was advised by defendants of the existence of some leases upon the property, but was not so advised as to plaintiff's lease. Some weeks later the defendant Schenck solicited and obtained from Farnsworth a lease for himself and brother to work the same claim formerly leased by plaintiff. Later plaintiff came to Farnsworth for possession under his lease of the property then being worked by the defendant Schenck, but Farnsworth informed him that, although he was willing to reinstate plaintiff in his former right, yet would decline, because of the differences existing between plaintiff and defendant company. On March 24th and 27th plaintiff served notice upon the defendants and upon Farnsworth, setting out his written lease, and the fact that he was induced to leave the property by defendants' false representations, and that he had discovered that the property was not sold, and demanded to be permitted to resume work under the lease. He was at that time told by the president of the defendant company that the property was sold, and restoration to possession was denied. Thereupon plaintiff brought this action for reinstatement, and for damages and an accounting for all ores removed from the claim in question. A trial by jury was had, and the plaintiff obtained a verdict for \$2,000 damages, from which verdict and subsequent judgment the defendants appeal to this court.

SNYDER, WESTERVELT, SNYDER & WIGHT, for appellants.

DEY & STREET and W. H. BRAMEL, for respondent.

After stating the facts, the opinion was delivered by ROLAPP, District Judge.

The principal ground upon which the appellants rely for a reversal is that the court erred in refusing to grant defendants' motion for a non-suit at the close of plaintiff's testimony. They insist that the motion should have been granted, for the following reasons: (1) Plaintiff's evidence failed to disclose that the defendant corporation made representations of any kind. (2) Any representations made by the defendant Schenck, purporting to cancel a written contract between plaintiff and the defendant company, were without the scope of his authority, and therefore of no binding effect upon anybody. (3) Plaintiff was not induced to surrender, nor did he surrender, his lease by reason of the representations made. (4) The representations made were in fact true, and operated as a cancellation of the lease.

Considering the first three points together, we think the plaintiff's case presented a prima facie case, and was properly submitted to the jury. Plaintiff's evidence tended to prove that the defendant David Schenck, as superintendent, acting on behalf of the Dalton & Lark Company, made the lease to plaintiff; that the Dalton & Lark Company knew of the existence of the lease, and knew that the plaintiff shipped ore to the company according to the condition of the lease, and settled with him for the proceeds of the ore under the terms of the lease. Plaintiff's evidence also tended to show that the same superintendent who made the lease to plaintiff, whose acts in so doing were unquestioned and ratified by the company, was also the same person who, while acting in the same capacity, notified plaintiff that the property had been

sold, and his lease had become null and void, and that he must quit work; that plaintiff relied upon the representations, and, acting under the directions of the superintendent, shipped the ore he had ready for shipment to the company, and the company settled with him for the ore; that, when the plaintiff discovered that the property had not been sold, he went first to Farnsworth, who was willing to reinstate him, except for differences existing between plaintiff and the Dalton & Lark Company.

We also think the testimony fairly tended to show that the defendant mining company ratified and approved the termination of the lease caused by the representations of the defendant Schenck, because, when plaintiff served a written notice and demand for reinstatement upon the defendants, they were informed of all the facts, notwithstanding which they not only declined to reinstate plaintiff, but plaintiff's testimony showed affirmatively that the president of the defendant mining company reiterated the superintendent's statement that the property had been sold.

Under such circumstances a corporation will not now be permitted to avoid liability because it is not affirmatively shown that express authority from its board of directors was given to its superintendent to make a statement relating to the working of property immediately under his supervision. The plaintiff had a right to believe that the greater authority of giving a lease of the company's property included the lesser authority of informing him when one of the contingent events mentioned in such lease as terminating the same should actually happen; and we think the plaintiff had the further right to act upon such representations without resistance or objections. That the authority to give such information actually did exist in the superintendent was finally made clear in this case when the defendant Schenck himself stated that he was acting for the defendant company in making his representations to the plaintiff.

The remaining point made by appellants upon the motion for a non-suit is that the representations were in fact true because plaintiff's lease provided that it should be null and void whenever there should be "a sale or transfer" of the property during the life of the lease, and appellants contend that in order to terminate this lease it was not necessary that any actual sale should have taken place, so long as there was a transfer or delivery of possession, as disclosed by the evidence in this case. That it was not true that there was a sale of the property is too apparent to admit of controversy. The very terms of the agreement between Farnsworth and the defendant company expressly forbid any such interpretation. No court could ever be induced to hold that an agreement providing that a party "does not bind himself to pay for said property" amounts to a contract of sale. Contracts of sale, before being such, must contain mutual obligations of full payment and absolute conveyance. Consequently the only inquiry is as to the meaning of the word "transfer" in this lease. The word "transfer" may mean either a conveyance of title or merely a delivery of possession; and, if the construction of a written contract is questioned, we must look to the document itself, to the entire transaction and the surrounding circumstances, to ascertain the true intent of the parties. There is nothing in the lease itself which would indicate that the minds of the parties ever met upon the proposition that the mere delivery of possession to a third party would have the effect to cancel plaintiff's lease, because, if that were true, defendants were at liberty, at any time when it became profitable to them, to lease the property to a stranger, and thus oust the plaintiff from possession. To put upon the lease the strained construction contended for by appellants would not be warranted by either the language of the contract or by any circumstances developed upon the trial of this cause. We think that, considering all the circumstances of this case and the document itself, the word

"transfer" was used in its ordinary sense as applicable to real property. When used in that connection, the word "transfer," unless otherwise restrained or limited, is either synonymous with the word "sale," or it imports something more than or subsequent to sale; selling being but one mode of transferring property. Property may be voluntarily transferred from one person to another by a sale or gift, or it may be involuntarily transferred by operation of law. In this case we are of the opinion that the reasonable construction to be placed upon the word "transfer" is that of a transfer of title, rather than a mere transfer of possession.

Appellants further insist that a reversal of the judgment below should be granted because the court erred in giving its instructions to the jury and in refusing to give certain instructions requested by defendants. We must refuse to consider these assignments of error, for the reason that the exceptions to such instructions and the refusal of the requests were not properly taken. It appears from the record that, after the court had delivered its charge to the jury in this action, counsel for defendants, while plaintiff's counsel was arguing to the jury, and before verdict, informed the court, without informing counsel for plaintiff, that he desired to save some exceptions to the charge of the court, and at the same time inquired of the court if he might have permission to have said exceptions taken down by the official court reporter on the record in the clerk's office, which was a room adjoining the court room. Thereupon the court informed counsel for defendants that he could take the exceptions in that manner, and thereupon counsel for defendants caused the several exceptions to the charge of the court as given, and to the refusal of the court to give the instructions as requested by the defendants, to be entered by the said court reporter on the record, and said exceptions so taken and entered were not called to the attention of the court or known to the court until after verdict, and upon the hearing of defendants'

motion for a new trial, and were not taken in the presence or hearing of counsel for plaintiff. Counsel for appellants admit that ordinarily, under the decisions of this court, the manner of thus entering the exceptions was improper and of no avail; but they insist that, inasmuch as the permission of the court was obtained to take exceptions in the manner indicated, the requirements of the statute have been substantially complied with, and that respondent cannot complain. But in this view we cannot concur.

While it is true that we have repeatedly held that the primary object of calling the attention of the court to any misstatement of law is to give the trial judge an opportunity to correct any errors in his charge before the jury reaches a verdict, and thus avoid the hazards of a new trial, yet that is not the only purpose of the practice; and as a matter of public policy we cannot even permit a trial judge to endanger the results of a trial by thoughtlessly avoiding having called to his attention any possible errors made by him in his charge to the jury or in any other portion of the trial. Hence the taking of exceptions outside of the court room, and without the knowledge of the adverse party, even if it is done by the consent of the court, is as much a wrong to such adverse party as it would be to the court if its consent had not been previously had. The statute relating to the taking of exceptions is enacted as much for the benefit of the litigants and the public as it is for the trial judge, and if exceptions are made publicly at the proper time the opposing party may confess the error, or avoid the possibility of error, by consenting to a correction of the charge complained of, and it must be presumed that ordinarily under such circumstances a trial judge would be willing to comply with the united requests of the opposing parties. In each contested action in any court in this state, each party is entitled to full notice of all proceedings had in such cause, from the filing of the complaint or summons until the rendition of the final judgment,

and if errors should occur during a trial, the exceptions to which have not been called to the attention of the adverse party or the court itself, such errors will not be reviewed by this court on appeal. Except in those cases where the law permits a question to be raised for the first time in the appellate court, or where the statute reserves an exception to a party as a matter of course, the only legal questions that could be presented to this court for determination upon appeal are those decisions or statements of law of an inferior tribunal deliberately advocated and attacked in the court below, and to which decisions or statements timely and public exceptions have been properly entered by the complaining party. While that is true, yet that does not dispense with a compliance of rule 6 of this court, requiring that "the points relied upon for the reversal of the judgment or decree or order appealed from" should be fully set forth. We think that this requirement is in the interest of the public and litigants, and the practice in that respect ought to be upheld as a just and time-saving provision. The assignment of errors is, in effect, the complaint in the appellate court, and it would be unjust alike to the court and opposing counsel to permit an appellant to urge for the first time in his brief, or upon oral argument, an error of which counsel for the respondent has not been apprised. Without an assignment of errors the court has nothing before it, and hence an omission to make such a written assignment will result in an affirmance of the judgment to the extent that it may be affected by the error not assigned. If, under special circumstances, justice should require a review of an unassigned error apparent upon the face of the record, the discretionary powers of this court are quite sufficient to permit such proceedings to be had as will properly present to this court the questions involved. Besides, in this case, we are of the opinion that the complaint states facts sufficient to constitute a cause of action and is not subject to a general demurrer. Therefore we see no neces-

sity for the exercise of any unusual power possessed by this court.

We think the judgment ought to be affirmed, with costs, and it is so ordered.

BASKIN and BARTCH, JJ., concur.

**¹E. L. EMERSON ET AL., APPELLANTS, v. R. S. McWHIRTER
ET AL, RESPONDENTS.**

(133 California 510; 65 Pac. 1036. Supreme Court. August 2, 1901.)

²There is no forfeiture for non-compliance with a district rule where the rule itself does not impose forfeiture as a penalty.

A district rule called for two notices—one at each end of the claim.

Only one notice was posted: *Held* not a fatal defect.

Whether unwatering a shaft counts for annual labor suggested but not considered.

³Facts amounting to resumption. The owner of the original location came to the ground December 30th; worked on the claim December 31st. January 1st was Sunday, but on the second he worked and so continuously until \$100 worth of labor had been performed. The relocation was initiated Sunday morning (after midnight of the 31st). *Held* a valid resumption of labor and that the relocation was void.

Sunday. The fact that the first day of January fell on a Sunday considered with the holding that the resumer is not bound to work on Sunday.

⁴The burden of proof is on the party alleging forfeiture and such proof must be clear and convincing.

Commissioners' decision. Department 2. Appeal from Superior Court, Tuolumne County; G. W. NICOL, Judge.

Action by E. L. Emerson and others against R. S. McWhirter and others. From a judgment for defendant McWhirter, and from an order denying a new trial, plaintiffs appeal. Reversed.

¹S. C. on motion to substitute parties, 60 Pac. 774.

²*Sisson v. Sommers*, 19 M. R. 644, holds that there is an implied forfeiture for disregard of either rule or statute concerning location.

³*McKay v. McDougall*, 25 Mont. 253; 64 Pac. 669. See notes to *Buffalo Co. v. Crump*, 22 M. R. —.

⁴*Wright v. Killian*, 21 M. R. 211.

CRITTENDEN HAMPTON and J. P. O'BRIEN, for appellants.

F. W. STREET and W. C. KENNEDY, for R. S. McWhirter, respondent.

WILL M. BEGGS, for Harry Argall and F. L. Argall, respondents.

CHIPMAN, C. Action to quiet title to a mining claim in Tuolumne county, called the "Slapjack Mine."

"The court found the following facts: That one Coyle on January 1, 1896, made a location of the claim in question, posted notice of his claim at one end of the claim, marked out the boundaries, and placed monuments at each of the four corners and at each end of the lode, and caused his notice to be recorded. By mesne conveyances plaintiffs and certain defendants, other than McWhirter, became the owners of Coyle's interest. A regulation of the mining district in which the claim in question is situated required two notices to be posted on the claim, "one of which shall be posted in a conspicuous place at each end of the claim." The court further found that plaintiffs did not do \$100 worth of labor or improvements on the claim for the year 1898; that on January 1, 1899, the claim was public mineral land and open to location; and that defendant McWhirter on that day located the same as the "Jim Blaine Quartz Mine."

Judgment passed for defendant McWhirter, and the appeal is from this judgment, and from an order denying plaintiff's motion for a new trial.

1. Defendant contends that Coyle's location was forfeited because he posted but one notice on the claim, whereas the local regulation required two to be posted. We waive the question whether defendant in this case can be heard to dispute the validity of Coyle's location. This court at an early day said: "The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture

of title. It would be enough to hold the forfeiture as the result of a noncompliance with such of them as make noncompliance a cause of forfeiture." *McGarrity v. Byington*, 12 Cal. 426, approved in *Bell v. Mining Co.*, 36 Cal. 214, where it was stated: "The failure of a party to comply with a mining rule or regulation cannot work a forfeiture unless the rule so provides." Approved by the Arizona supreme court in *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Johnson v. McLaughlin*, 4 Pac. 130; also by Judge Sawyer in *Jupiter M. Co. v. Bodie Con. M. Co.*, 7 Sawy. 96, 11 Fed. 666. See, also, *Flaherty v. Gwinn*, 1 Dak. Append. 509. The Montana court declined to follow the California cases. *King v. Edwards*, 1 Mont. 235. We think, however, as was said by the Arizona court, that the cases cited announce "a safe and conservative rule of decision, tending to the permanency and security of mining titles," and we see no reason for deviating from the decisions heretofore rendered on the point.

2. The remaining questions relate to the amount of the work done by plaintiffs during the year 1898, and to their resuming work in 1899. More than the requisite work was done for the period ending December 31, 1897, and it was found by the court that Coyle made a valid location. It appears from the evidence that one of the plaintiffs (E. L. Emerson) went to the mine in March, 1898, with five men, for the purpose of taking the water out of the principal shaft. This shaft was 65 feet deep, near the bottom of which was a drift or tunnel running off west from the shaft. The mine was unwatered down to the drift. Witness Emerson states in detail what he paid for the labor of the men, etc., amounting in all, including his own labor at \$30, to \$111.93. On cross-examination he stated: "I went there to take that water out. An expert was coming to examine the mine. Therefore I took out the water. To clean it up so he could see it." It took three days and nights to get the water out, and the balance of the time was spent in keeping it out. He testified

that he took the water out "solely that the expert could see the mine, and if he reported it favorably the mine was sold." Whether the expert came does not appear. The witness did not see him if he came. It does not appear that any work was done in the shaft or drifts, except to pump the water out. In June following, plaintiff Britton, one of the owners, visited the mine, but did no work at that time. About October 11, 1898, he went to the mine with his partner, Emerson, and remained nearly one month, and lived in a house on the mine. One Elwell and his family were living in part of the same house. Witness and Emerson worked about three days in a shaft that had been previously started, not the one formerly unwatered. Witness testified that they "sunk probably about three feet. It was picking ground, but hard, so we stopped it." This work was on the ledge, and, with the exception of looking up the corners and cutting some brush, it was all the work that was done at that time. When they left they posted a notice on the house, and left one copy with Mrs. Elwell. On December 27, 1898, they filed with the county recorder an affidavit that they had done at least \$100 worth of work on the mine, stating, among other things: "Said labor consisted of taking water out of the shaft, and work upon shaft and upon ledge. Said labor was performed during the year ending December 31st, 1898." Witness Boynton testified that he went to the mine December 30, 1898, under employment by the plaintiffs, and "worked there continuously, excepting Sundays," until January 25th, on which day he came away. He testified positively that he worked Saturday, December 31st. He bought his tools and supplies at Groveland, from a merchant named Cornwell, who testified that on Friday, December 30th, he sent them to the mine, which was $2\frac{1}{2}$ miles distant. He was certain of the date, from circumstances which he related. January 1, 1899, fell upon Sunday, and Boynton testified that he did not work on that day, but resumed work on Monday morning,

January 2d, and worked that day. He testified: "Excepting one stormy part of day, I worked. I worked the following days of the week. * * * Mr. Britton, here, worked with me twelve days. No one else. I was paid \$3 per day. I used an ax and shovel cutting brush; and in drift, pick and shovel." His wages amounted to \$63, of which \$40 was paid, and \$23 was still due. Most of his work was in clearing away brush. Britton testified that he came on the 10th or 11th of January, 1899, and worked from that time on with Boynton; that Boynton was instructed to clear away the brush, the purpose being to fix the ground for a mill site; they worked together for 12½ days. He testified: "When he worked with me the character of the work was an open cut made over the ledge, near the shaft, and another open cut on the east end." He further testified that he examined the corners of the claim closely in January before they quit work. On January 26, 1899, Britton made and filed with the county recorder an affidavit of labor performed, "consisting of excavating two open cuts, and draining tunnel, and clearing off brush. One cut about average width of about five feet, by fifty feet long on vein and seven feet deep; also an open cut on vein about six feet wide by two feet in depth by twenty feet long * * * for the year ending December 31st, 1898. Such expenditure was made by or at the expense of F. F. Britton and E. L. Emerson, for the owners of said claim, for the purpose of holding said claim." Appellant's evidence consisted of his own testimony, that of one Paul, and the man Elwell, who lived on the mine. Defendant testified that he and Paul went to the mine on December 31, 1898, about 2 o'clock p. m., and that he "did not see any one at work. Did not see any evidence of work being done." They went around the boundaries, to the corners, and also to shaft Nos. 1 and 2, but saw no one working. He testified: "I was over a great portion of the location. There was a portion of that I would not want to go over. Mr. Paul told me

this ground was open for location." Paul testified: "We went to corners, shafts, and all over it; went round by boundary lines; examined monuments and posts; was there about one and one-half hours. * * * I did not see anybody at work on the Slapjack mine during December 31st. If there had been any one there, we would have seen them." They returned between 11 and 12 o'clock that night, and sat around until a few minutes after 12, when McWhirter posted his notice. Paul testified: "We waited for an hour or more, bid each other good-by, and each went our way." Elwell testified that he first saw Boynton at the mine "the night of December 31st." Again: "Mr. Boynton came there December 31st. I don't know at what time he came. I don't know if he did any work. I wasn't there. I got home about seven o'clock on the evening of the 31st." Again he testified that he (witness) was not there on the 30th; that he was there only at nights, and not days, and usually came home about 6 or 7 o'clock. Elwell's testimony cannot be received as in any degree contradicting Boynton on the point that the latter was at work on the mine December 31st. Nor do we think that the testimony of McWhirter and Paul necessarily raises a substantial conflict with Boynton's testimony on this point. Neither of them testified to having been at the place where Boynton said he was cutting out the brush, and where Britton said Boynton was clearing away for a mill site. This point was at a part of the mine not visited by McWhirter or Paul, and it is quite reasonable to suppose that Boynton worked as he testified positively that he did, and yet not be seen by these men. They testified that they were there about an hour and a half, and that they hunted out all the corners and monuments of the claim, and ran around the boundaries, which must have occupied most of this time. The negative fact that they did not see Boynton at work is not sufficient to raise a conflict in his positive testimony that he went there on December 30th, and worked cutting out brush on the 31st,

corroborated as he is by the testimony of the merchant who sold and delivered supplies to him on the mine on December 30th.

The evidence is undisputed that Boynton worked on Monday, January 2d, and thenceforward until Britton came, and thereafter the two worked together. The two worked in all $33\frac{1}{2}$ days, which, at \$3 per day (the wages paid Boynton), would make over \$100.

Respondent contends that the work done in unwatering the mine for the sole purpose of its examination with a view of sale was in no sense the annual assessment work contemplated by the statute. It is unnecessary to decide whether respondent is correct in this view of the law. The case may be disposed of on other points. See, on the question, 2 Lindl. Mines, § 629, and cases cited.

3. Appellants contend that, if it be held that their work in unwatering the mine cannot avail, they resumed work in good faith, and thus prevented forfeiture. The act provides that upon a failure to comply with the conditions as to doing the requisite work, the mine "shall be open to relocation in the same manner as if no location of the same had ever been made; *Provided, the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.*" Rev. St. U. S. § 2324. Plaintiffs Emerson and Britton worked for three days each in October, 1898, remaining at the mine nearly a month. Boynton went to the mine on December 30th, under instructions to resume work and continue it, and worked there on the 31st for plaintiffs. He rested the next day (Sunday), worked on Monday, January 2d, and thenceforward until joined by Britton, and they two worked together, completing the requisite \$100 worth of labor. The evidence shows entire good faith on plaintiffs' part in working the mine in 1898, and in resuming labor in 1899. Defendant McWhirter made his location on Sunday morning at about

12:15 of the clock. Plaintiffs were then in possession. They were in possession on Sunday, but rested from labor, as they had a right to do. They worked on Monday, and continuously thereafter, until their labor amounted in value to over \$100. We think these facts show resumption of work, within the meaning of the statute, and prevented forfeiture.

Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, and no evidence appears from which an intention to abandon may be inferred, the courts should construe the law liberally, to prevent forfeiture. Indeed, this is the rule generally as to forfeitures.

The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law; and it is well settled by decisions that forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests with the party asserting it. 2 Lindl. Mines, § 643 et seq.

It is advised that the judgment and order be reversed.

GRAY, C., and SMITH, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

Hearing in bank denied.

YREKA MINING & MILLING CO. v. LUKE KNIGHT.

(133 California 544; 65 Pac. 1091. Supreme Court. Aug. 6, 1901.)

Proving location by what is found on the ground. Where there was no evidence of the original marking of the boundaries but there was found at the date of the attempted relocation, six years later, sufficient monuments to enable the boundaries to be readily traced, and the notices properly described the claim, the claimant holding actual possession under chain of title from the alleged locators, that is sufficient proof of location as against a party attempting to relocate the claim.

Where plaintiff is in possession of a mine as successor in interest of the locator the facts above recited amount to *prima facie* evidence of the location sufficient to justify a verdict against one who, knowing of such location, relocated the mine on the claim that the mine had been abandoned and no work done thereon during the preceding year.

Deeds prove possession. Where plaintiff produced deeds for mining claims from the persons who located the mines more than six years before the trial, and showed its actual possession for the last two years, a verdict that it and its predecessors had been in possession for six years was justified as against a defendant claiming the mines as abandoned.

Work on group. Where plaintiff, owing three contiguous mining claims, did no work on one claim, but did sufficient on the other two to have protected all, the question whether the work so done was for the benefit of the group of claims and tended to develop the one not worked on was for the jury.

Commissioners' decision. Department 1. Appeal from Superior Court, Siskiyou County; J. S. BEARD, Judge.

¹Long continued possession raises a presumption of ownership. *Risch v. Wiseman*, 20 M. R. 409.

Old worked stopes are the best of evidence to prove continuity of vein. *Penn. Co. v. Grass Valley Co.* 117 Fed. 509; 22 M. R. —.

Evidence that defendants had dug a shaft and built a cabin on the premises is sufficient evidence of possession to leave to the jury. *Koons v. Bryson*, 69 Fed. 297.

Proof of a 25 foot shaft, of "rich rock" and "gold bearing rock" within the lines of the claim held indirect but sufficient proof of discovery. *Conway v. Hart*, 21 M. R. 20.

Action by the Yreka Mining & Milling Company against Luke Knight. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

WARREN & TAYLOR, for appellant.

O'NEIL & BUTLER, for respondent.

CHIPMAN, C. Injunction. Plaintiff alleges in its complaint that it is, and for six years last past has been, the owner, in possession and entitled to the possession of certain three quartz-mining claims situated in Siskiyou county, to wit, the Ada, Flora Blanche, and Ohio; that the mines are contiguous, extending in the same direction, forming one continuous mining claim 4,500 feet in length and 600 feet in width, all containing valuable quartz rock bearing gold; that, on January 2, 1899, defendant wrongfully entered upon a part of the Ada and a part of the Flora Blanche claims, and made excavations, and carried away and converted to his own use a large amount of valuable ore, and that he threatens to continue to remove ores from the said mines. Defendant denies the averments of the complaint and alleges that he entered upon the lands January 2, 1899, "with the intention to take up and locate a portion thereof as a mine, and did stake out and mark said land," and "ever since the said 2d day of January, 1899, has been the owner and entitled to the possession of said mining land, * * * known as the 'Mary Ann Quartz Mine.'" A jury was called, and certain 25 specific questions were submitted to and passed upon by them; and all were answered in favor of plaintiff. Thereupon the court made its conclusions of law: (1) That plaintiff is the owner and entitled to the possession, subject to the paramount title of the United States, of all lands embraced within the boundaries of the claims set forth in plaintiff's complaint; (2) that defendant's location is invalid and void

"for the reason that the same was not subject to location"; (3) that plaintiff is entitled to a decree enjoining defendant from entering upon the land embraced within the boundaries of plaintiff's said claims. Judgment was accordingly entered, from which and from the order denying his motion for a new trial defendant appeals.

It appeared that on January 29, 1892, written notices of location of the three claims in question, to wit, the Ada, Flora Blanche, and Ohio, were filed in the recorder's office, in the order named, by W. P. Sheffield, John Travers, and Harvey Ax, respectively, and said claims at that time had thereon a vein of gold-bearing quartz in place; that these locations as a whole constituted a relocation of what had theretofore been known as the "Klamath Quartz Mine," and were contiguous, as alleged in the complaint; that a local custom, which had been in force over seven years, required that in making locations "a notice be posted on the location, and also a copy recorded in the office of the county recorder"; that plaintiff deraigned title from these locators, and expended in 1898 on the Ohio \$400 and on the Flora Blanche \$150 in work and improvements; that "on January 1, 1899, and prior to the time at which defendant claims to have located the Mary Ann quartz mine, plaintiff had resumed work, and continued the same thereafter uninterruptedly, and until the full amount of \$300 had been expended as assessment work for the year 1898."

The foregoing facts, mainly found by the jury, are not challenged and stand as admitted. The jury found that John Travers distinctly marked upon the ground his location of the Flora Blanche "in such manner as that its boundaries could be readily traced." The jury were asked, if they found as above, then to find whether the markings "were made according to the calls in his notice of location, which has been introduced in evidence, in whole or in part, and, if in part only, then what part." The jury answered: 1. Yes. 2. In

part. 3. On the southwest end center line and S. W. corner, and N. W. corner." Similarly the jury found as to the Ada that Sheffield's location was by him distinctly marked, and "in such manner as that its boundaries could be readily traced," and that such markings were in part according to the calls of the written location, namely, "On the N. E. end center line and S. W. corner." Likewise it was found that the Ohio was distinctly traced on the ground by Harvey Ax, and that his location was marked according to the written location in part by "N. E. end center line and N. W. corner."

We think there was sufficient evidence to support the verdict. The locations were made in 1892, and the notices, copies of which were introduced in evidence, contained such specific calls and references to monuments that a surveyor would have no difficulty in locating the boundaries with knowledge of the location of these monuments testified to by the witnesses. It is true the witnesses, with the location notices in their hands, were at the time unable to find all of the particular monuments referred to in the notices; but it does not follow from that fact that the monuments were never placed there, or that the boundaries of the locations could not be ascertained. These notices were filed in 1892, and in six years many changes might take place along the boundary lines, which would account for the witnesses not being able to discover all the particular monuments referred to. It is true, as claimed by appellant, that it would be insufficient marking of boundaries of a mining claim to place thereon only such monuments as were found by the witnesses and make no other markings of boundaries. The question here is not dependent alone on the evidence as to particular monuments which were found. Notices were filed as early as 1892, claiming ground theretofore well known as the "Klamath Mines." These notices were accessible, and presumably were known to defendant, and with them, as we have said, the boundaries could be traced, for they were so specific in their

directions that, with the monuments testified to being found, the boundaries could be defined. The jury found that the claims had been marked out by the locators, so that the boundaries could be readily traced, and it is urged that there was no evidence to support such finding. There was no evidence of this fact, except the location notices and the discovery of the monuments already referred to. The locators were not called as witnesses, nor was any person called who assisted in making the locations. The jury must have reached the conclusion that the locators did in fact what the evidence showed they might have done; i. e., they found that the notices of location definitely described the boundaries and that sufficient monuments were found, corresponding with those mentioned in the notices, to enable these boundaries to be traced at this time, and hence concluded that the locators originally marked the boundaries so as that they might be readily traced. Plaintiff was in possession under title deigned from these locators. As against a relocation by a person having knowledge of the former locations and of plaintiff's possession as successor in interest, there was evidence sufficient *prima facie* to support the verdict. Defendant went into possession and made his relocation, not because there had never been a valid location, but, as he himself testified, because he thought the claims had been abandoned and were open to location and because no work had been done on the claims for the year 1898.

The jury found that plaintiff at the commencement of the suit, February 13, 1899, was in possession, and for six years prior thereto it and its predecessors had been in possession.

Plaintiff's right to possession was evidenced by deeds from the original locators and their grantees to plaintiff, and there was evidence of actual possession in 1897 and in 1898. This was sufficient as against defendant.

The remaining question relates to the finding that there was "\$400 worth of work done on the Ohio claim and \$150

on the Flora Blanche, being \$550 in all for the benefit of all three claims" for the year 1898. There was no work done on the Ada that year. Plaintiff claims that the work done on the Ohio and Flora Blanche was for the benefit of the group. It was held in *De Noon v. Morrison*, 83 Cal. 163, 23 Pac. 374, following *St. Louis Sm. Co. v. Kemp*, 104 U. S. 654, that "as a matter of law the plaintiff had the right to do the work necessary for the protection of both claims or one of them, both being held by her in common." It was further held that it was for the jury to determine as a question of fact whether work done on one of two contiguous claims owned by the same person is for the benefit of both claims. See, also, *Altoona Co. v. Integral Co.*, 114 Cal. 100, 45 Pac. 1047. There was evidence tending to show that the work consisted of running a tunnel, stoping from it on both sides building ore chutes, tracks, blacksmith shop, and a house, and getting out timbers amounting in value to nearly \$1,000, and that the amount of work done was about equal on these two claims. The tunnel was run partly on the Ohio and partly on the Flora Blanche, at a point near the dividing line of the two claims and about the center, or along the ledge. The superintendent testified that the work was intended to develop the whole group of mines, and he gave his reasons for believing that the work tended to develop the Ada. There was some evidence corroborative of this testimony. Defendant introduced witnesses who testified in effect that the work done could not, in their opinion, be of the slightest benefit to the Ada claim, nor in any way tend to develop it. The jury might well have taken this view of the evidence; but we cannot say that the evidence was insufficient to warrant the conclusion to which the jury came. The evidence on the point was in conflict, and under the well-settled rule we cannot interfere with the verdict.

It is advised that the judgment and order be affirmed.

GRAY, C., and SMITH, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

GAROUTTE, J., HARRISON, J., VAN DYKE, J.

¹BROWN ET AL. v. THE OREGON KING MINING CO.

(110 Federal 728; U. S. Circuit Court District of Oregon. August 9, 1901.)

¹**Location a question of law.** Where defendant had complete evidence of a valid location prior to any valid location of plaintiff, to instruct the jury that the validity of such location is left to their determination is erroneous and necessitates a new trial, on a verdict against the validity of such location.

²**Second claimant no jumper.** Where an attempted location is invalid a second party has a right to locate the ground and his knowledge of the previous attempted location is not admissible to place him in the light of a trespasser or jumper.

Admission of the prior claimant's location notice in such case is prejudicial error.

DOLPH, MALLORY, SIMON & GEARIN, ALBERT ABRAHAM,
and H. H. RIDDELL, for plaintiffs.

¹S. C. on appeal, 119 Fed. 48; 22 M. R. —.

²It requires a location to give the right of possession to a mining claim; whether or not there is a location is a question of law. *Jordan v. Duke*, (Ariz.) 36 Pac. 896.

The ultimate fact of location proved is for the jury or trial court. *Eaton v. Norris*, 21 M. R. 205.

³First complete location takes the ground if first discoverer lets the statutory time go by. *Copper Globe Co. v. Allmann*, 21 M. R. 296.

What is sufficient proof of in favor of grantees of discoverer as against jumper. *Yreka Co. v. Knight*, 21 M. R. 478.

Where neither party has marked bounds, the first claimant will hold. *Neuebaumer v. Woodman*, 89 Cal. 310; 26 Pac. 900.

Proof of prior record will not defeat later record, in absence of proof of prior discovery. *Smith v. Newell*, 86 Fed. 56.

A second party may enter where the original location notice was void. *Deeney v. Mineral Co.* — N. Mex.—; 22 M. R. —.

A second locator who complies with the law takes as against the first who fails. *Garthe v. Hart*, 73 Cal. 541; 15 Pac. 93. *Contra Craig v. Thompson*, 10 Colo. 517; 16 Pac. 24.

Where at date of B.'s location the ground was not Public Domain and after it became such and before B. filed a relocation, G. locates, G. has the prior claim. *Gurney v. Brown*, 32 Colo. 472; 77 Pac. 357.

MOODY & LONG, and W. H. WILSON, for defendant.

BELLINGER, District Judge. There are two vital questions in the case: Did the location under which defendant claims mark the claim on the ground so that its boundaries could be readily traced; and, if not, was a copy of Brown's location, made in 1899, filed with the county recorder as required by the Oregon law of 1898? All the other material facts in the case are either admitted, undisputed, or conclusively established. Brown, in 1897, was the first discoverer of the mine. His attempted location in that year was insufficient and invalid. His subsequent location in 1899 was sufficient to vest in him the title which he claims, if he has complied with the law as to filing a copy of his location, unless the location made in 1898, under which defendant claims, was valid, in which event the defendant has the prior right. Except as to the two questions mentioned, it is undisputed that both parties have complied with the law under which titles to property of this character vest. Such being the case, the court of its own motion, instructed the jury as follows: "Brown's location in 1897 not being valid, if the defendant's location, or the location of Wilson, under whom the defendant claims, which was made in 1898, was a valid location, then I am of the opinion that the defendant ought to recover in this case. But I do not so instruct you. I leave the matter open for your own determination." This instruction is indefensible. The right of the defendant depends entirely upon its location. It is suggested that, notwithstanding a valid location by those under whom defendant claims title, there might still be an adverse finding for failure to comply with the law in other respects,—such as the work required to be done, etc. But, if there are such questions, they are merely formal. They were not matters of controversy on the hearing, and the jury could not have understood the instruction to refer to them. The instruction that the jury might find for plaintiffs al-

though satisfied that defendant's location was a valid one, was especially injurious under the circumstances of the case. Brown's discovery and attempted location in 1897 raised most persuasive equities in his favor. The instruction relieved the jury from the requirements which the law attached to the fact of a prior valid location by defendant's grantor, if such there was, and opened the door to them to do equity agreeably to their own feelings, so far as that question was concerned. The motion for a new trial must be allowed because of this instruction, unless the court can say, as a matter of law, that defendant's location is not a valid one; and this is not claimed by the plaintiffs, who strongly argue that it is a question for the jury; and, if so, it is, as we have seen, a question for the jury to some purpose in the case. But, without this instruction, I should feel compelled to allow this motion, because of error in admitting in evidence the location notice testified to by the witness Wilson,—that being the second location notice offered in evidence by plaintiffs. The ground upon which this notice was admitted was that it tended to prove discovery. If such a notice is admissible for this purpose, the second notice could add nothing to the effect of the first notice, admitted in evidence for that purpose. The multiplication of location notices adds nothing to the legal effect of one such notice. If one notice tends to prove discovery, two notices do not strengthen the proof. Wilson was the locator under whom defendant claims. The value of the second notice to the plaintiffs was not that it contributed anything to their proof of discovery, but that it proved knowledge by Wilson of the prior attempted location, and tended to show that Wilson was a jumper. If Brown had failed to comply with the law, and the property was at the time subject to location, it was wholly immaterial whether Wilson knew of Brown's prior claim. He might lawfully locate a claim himself. And it is in fact, as we have already seen, not disputed that Brown's location of 1897 was invalid,

and that the claim was open to location at the time in question by Wilson or others. Wilson was not a trespasser or jumper. He was not seeking to acquire the claim in violation of Brown's right, since it is conceded that Brown at the time had no right. But this testimony gave to Wilson's act that appearance, and may have influenced the verdict. And this appears to have been the object of plaintiffs in the introduction of this testimony, as is inferred from the statement of their counsel referring to this point, on the argument of this motion, to the effect that Wilson was a jumper, and the plaintiffs might properly show that fact. It is argued in support of this motion that the court erred in its instruction as to the validity of Brown's filing with the county recorder. The law requires a copy of the notice to be filed. Whether the paper that was filed was a copy, or was a different and altogether independent paper relating to the same subject, is a serious question in the case. I assumed, in the instruction given, that it was a "copy" within the statute, because it performed the office of giving the notice which the statute intended to provide. The conclusion reached as to the points hereinbefore discussed renders consideration of this question and of the other questions urged in support of the motion unnecessary.

The motion for a new trial is allowed.

J. M. BURNS V. TRUMAN CLARK ET AL.

(133 California 634; 66 Pac. 12. Supreme Court. Aug. 12, 1901.)

¹A laborer employed to grade for the foundation of a mill found a pocket of free gold. The ground was public domain and although the defendant was about to build a mill he had not yet made a location. *Held*, that the laborer had the finder's right, good against all the world except the true owner.

"By virtue of his employment." The employer was not entitled to the gold under code Section 1985, giving to the employer what his servant acquires "by virtue of his employment."

Had the employment of plaintiff been to mine his find would have been the property of the employer, but he was employed to do work of a wholly different character and on ground which for the mill site purpose intended must be non-mineral ground.

Commissioners' decision. Department 2. Appeal from Superior Court, Tuolumne County; G. W. NICOL, Judge.

Action by J. M. Burns, an infant, by Michael Burns, his guardian *ad litem*, against Truman Clark and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. *Reversed*.

J. C. WEBSTER and E. W. HOLLAND, for appellant.

F. W. STREET and REINSTEIN & EISNER, for respondents.

SMITH, C. Appeal from a judgment for the defendants, and from an order denying the plaintiff's motion for a new trial. The suit was brought for the conversion of certain

¹*State v. Burt*, 4 M. R. 190. *Thallman v. Thomas*, 21 M. R. 573.

A sack full of rich gold specimens, evidently cached many years before by unknown party, held to be the property of the owner of the soil and not of the finder. *Ferguson v. Ray*, 44 Oreg. 557; 77 Pac. 600.

gold and gold-bearing rock, of which it is alleged in the complaint the plaintiff was on the day named, the "owner * * * and lawfully possessed," and which it is alleged the defendants "wrongfully and unlawfully and against the will of [plaintiff] took and carried away" and "converted * * * to their own use."

The facts of the case, as found by the court, are that the defendants Schoenfeld, Adler, and James, who were the owners of certain mines, employed the plaintiff as a laborer to assist in the grading of a mill site on the public lands for the use of their mines, and that "plaintiff, while working for said defendants * * * in digging and leveling off a grade for a quartz mill, discovered and dug out of said grade a pocket of quartz gold of the value of about six hundred dollars; that the plaintiff and his co-laborers gathered up said gold and gold-bearing quartz in a gold pan, and took the same to the office and delivered it to the defendant * * * Bleck [the superintendent], who took possession of said gold for his employers." But there was no evidence to justify the finding that the plaintiff took the gold to Bleck or that he delivered it to him. The evidence, without contradiction, was to the effect that Clark, the overseer, took it from the plaintiff and delivered it to Bleck.

There is no finding as to the plaintiff's alleged possession of the gold at the date named in the complaint. All that is found is that he "was not lawfully possessed of" it. Nor is there any finding as to the plaintiff's intention to appropriate the gold when he took possession of it, though the plaintiff testified explicitly that such was his intention. It must be assumed, therefore, for the purposes of this decision, that the plaintiff, on discovery, reduced the gold to possession, with intent to appropriate it to himself, and that it was taken from his possession by Clark, the agent of the defendants Schoenfeld & Co. Otherwise, assuming these points to be material, it would be necessary to order a new trial for lack

of findings, or for insufficiency of the evidence to justify the finding as to the delivery of the gold to Bleck by the plaintiff.

Prima facie, these facts being assumed, the plaintiff was entitled to recover. Mere occupancy of a thing, as against all except the state and the owner, is a sufficient title. Civ. Code, § 1006. And, where things are found that have no owner, "they belong, as in a state of nature, to the first occupant or fortunate finder." 2 Bl. Comm. 402; 1 Bl. Comm. 295; 2 Kent, Comm. 356. And in the case of valuable mineral deposits the title of the first taker is confirmed by express statutory grant. Rev. St. U. S. § 2319; *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313. The title of the plaintiff must therefore prevail, unless, on the facts found, a better right is disclosed in the defendants; and whether or not this is the case is the question to be considered.

Such a right is claimed by the respondents on two grounds, namely: (1) On the alleged ownership of the land out of which the gold was taken; and (2) that the gold was acquired by the plaintiff "by virtue of his employment."

1. With regard to the former ground, the contention is that the land on which the gold was found was in the actual occupancy of the defendants, and consequently, as against all the world except the government, their title good by occupancy. Civ. Code, § 1006. This contention involves two propositions, one of fact, and one of law, neither of which, we think, can be sustained.

With regard to the fact, it does not appear from the findings that the gold was discovered on land occupied by the defendants. The ground was public land of the United States, and the defendants had entered upon it for the purpose of grading a site for a quartz mill. But there was no location of the land with a view of acquiring title under the laws of the United States (Rev. St. § 2337; 1 Lindl. Mines, § 519), or, it was stipulated, "location of any kind, and no monuments or marks to show its boundaries." The occu-

pancy of the defendants, therefore, assuming it to be coextensive with the intention with which they entered, cannot be regarded as extending beyond the level space graded for the site of the mill, and for use in connection therewith. But the gold was not found within the limits of this space, and, if the finding of the court that it was "discovered and dug out of said grade" is to be thus construed, it has no support in the evidence. The gold was discovered at the northwest corner of the excavation made in the hill, and according to the evidence of all the witnesses at or close to the upper edge of the sloping rock left by the excavation, and according to some witnesses one or two feet beyond. There is no finding whether it was within or without the outer line of the actual excavation, or of the excavation intended, except the finding that it was "discovered and dug out of the grade." Nor, unless the term "grade" be limited to the level space graded for the site of the mill, can any very definite sense be assigned to this finding. Bouv. Law Dict. word "Grade"; *Little Rock v. Citizens' St. Ry. Co.*, 56 Ark. 32, 33, 19 S. W. 17.

But, whether the gold was found within or without the outer line of the excavation, there is nothing in the findings or the evidence to show that the defendants intended to occupy any land beyond the foot of the excavation in the rock, or to appropriate any land beyond it for any purpose; and with reference to the ground actually graded or leveled, or to be graded or leveled, the appropriation was not with a view of acquiring title to the land, but for a particular purpose, which, in the absence of evidence or finding to the contrary, must be presumed to have been temporary. Such an occupation is entitled to protection against unlawful intrusion, but is insufficient to give title, real or presumptive, to the land. To constitute foundation of title, the occupancy must be with the intent or design to acquire the ownership of the thing occupied. Bouv. Law Dict. word "Occupancy," and authorities cited.

Nor, were the contention of the defendants otherwise good, could any title to mineral lands be acquired by occupancy, except for the purpose of mining or extracting the minerals. Rev. St. U. S. § 2319; *McClintock v. Bryden*, 5 Cal. 97, 63 Am. Dec. 87, 91, et seq.; Lindl. Mines, §§ 216 et seq., 219. The entry of the defendants in this case was not for this purpose, but for the purpose of establishing a mill site; which was permissible only on non-mineral land. Rev. St. U. S. § 2337; Lindl. Mines, § 519 et seq.

2. The remaining contention of the respondents is that the gold was acquired by the plaintiff "by virtue of his employment," and hence, under the provisions of section 1985 of the Civil Code, became the property of his employers, the defendants. But, whatever be the meaning of the provision cited, there is no finding that the gold was so acquired. All that is found is that "plaintiff, while working for said defendants, * * * in digging and leveling off a grade," etc., discovered the gold, etc. This is not a finding that the plaintiff discovered the gold in digging out and leveling off the grade, but that he found it while working for the defendants in that way. The expression is not unambiguous, but this seems to be the natural construction, and is more in accord with the facts as shown by the evidence, which were that, though the gold may have been discovered by the plaintiff while working for the defendants, it was dug out by him not in the course of his work, but independently of it, and for the sole purpose of extracting the metal.

But were the finding more explicit, and did it appear that the gold was discovered and dug out in digging and leveling the grade, the result would not be different. The defendants were engaged in excavation, not for the minerals, but for the purpose of removing and throwing away the matter excavated, or, it may be said, the taking of the matter excavated was with the purpose of abandoning it. Had the object or one of the objects of the excavation been to obtain the gold,

any gold found by any employé would doubtless belong to his employers. But the gold found by the plaintiff was property without owner or intending owner, and therefore subject to his right of appropriation by occupancy. The case is therefore the same in principle as that in *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, where the property was found by the employé in the course of her employment, and in the similar cases of *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664, and *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 529.

It is not to be supposed that the intent of the provision in section 1985 of the Civil Code was to alter the established law in this respect. Rather it is to be construed as but an expression of the familiar principle that forbids an agent or trustee from using the trust property or powers conferred upon him for his own benefit, and which, in case of his doing so, requires him to account for the profits. Whart. Ag. §§ 231, 236, et seq.; Civ. Code, §§ 2229, 2237; 1 Story, Trustees, §§ 321, et seq., 323. The term "virtue," as in the cognate expression "*virtute officii*," is here used to denote merely the power or authority proceeding from the employment, and the expression "by virtue of his employment" has no application to acquisitions not coming within its scope or purpose. Winf. Adj. Words and Phrases; 2 Esp. 541, note; *People v. Schuyler*, 4 N. Y. 187; *Seeley v. Birdsall*, 15 Johns. 267. Had the object of the grading been the acquisition of the ores to be extracted, the provision would no doubt apply; but the casual finding of gold by an employé in the course of an employment in no way related to such an object, though doubtless an acquisition made by reason or cause of the employment cannot with propriety be said to have been by virtue of it.

I advise that the judgment and order appealed from be reversed.

CHIPMAN, C., and GRAY, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

HENSHAW, J., MCFARLAND, J., TEMPLE, J.

Hearing in bank denied.

A. J. COOK v. FRANK R. ENRIGHT.

(134 California 1; 66 Pac. 3. Supreme Court. Aug. 14. 1901.)

¹**Improvements by option holder.** Where a party enters on a mine under an option providing that his improvements revert to the owner in case of no sale he is liable for the removal of buildings which he placed on the ground and the owner was not bound to tender him a deed before action.

Department 2. Appeal from Superior Court, Shasta County. EDWARD SWEENEY, Judge.

Action by A. J. Cook against Frank R. Enright. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

GARTER, DOZIER & WELLS, and JACKSON HATCH, for appellant.

REID & BARTLETT, and BELL & BARBER, for respondent.

PER CURIAM. The plaintiff recovered judgment in the court below for certain permanent mining improvements and machinery removed from the plaintiff's premises, or its value, etc. The defendant appeals from the judgment. The case, as presented by the complaint and findings, is as follows: The plaintiff was the owner of the mining claim described in

¹Improvements put up, where Vendor refuses to sign contract belong to the Vendee. *Goodwin v. Perkins*, 134 Cal. 564; 66 Pac. 793.

Tenant after forfeiture of lease may remove fixtures. *Updegraff v. Lesem*, 20 M. R. 620.

A lessee has a reasonable time after forfeiture to remove his fixtures. *Gartlan v. Hickman*, — W. Va. —; 49 S. E. 14.

Improvements include removable betterments placed on the land by intending purchaser. *Smith v. Detroit Co.* — S. Dak. —; 97 N. W. 17.

the complaint from which the machinery was removed. The defendant entered on the premises under a bond executed to him by plaintiff August 25, 1896, in the sum of \$10,000, conditioned for the execution of a conveyance of the premises to defendant on the 25th day of February, 1898, provided the latter should have paid to the former the sum of \$10,000. It was also provided in the contract that the defendant should "have the right to the immediate possession of the premises, and to work the mine"; and that, "in the event of his failure to pay the said sum of \$10,000, at the time above mentioned, the said mining property and premises, together with all the improvements thereon, shall revert to and remain the property of the party of the first part, and then this obligation to be void." Indorsed on the bond is a written acceptance of its conditions, signed by the defendant. The effect of the bond is alleged in the complaint, and a copy attached, and it is alleged and found that, pending the defendant's occupation of the land under the agreement, the defendant "placed upon said mining claim, as permanent improvements thereon; permanently affixed thereto, a certain building, and in said building and on said mining claim placed the following described mining machinery and fixtures" (describing it); and "that said above-mentioned articles were permanently attached and affixed to said mining claim." It is found "that said defendant did not, at the time agreed upon, pay said \$10,000, or any part thereof, nor has he at any time since said date, or at all, paid the same, or any part thereof, or offered to pay the same." The machinery, which is alleged to be of the value of \$4,200, was removed by defendant, and the prayer of the complaint is for its possession or value. No affirmative defense is set up by the defendant in his answer.

The only point made by appellant's counsel is that the plaintiff's alleged right to the machinery is based on the contract, and not on his previous ownership of the land, and that, in order to maintain his action, an offer or tender to

convey was necessary on his part. This point is not tenable. This is not a case of mutual and dependent covenants, as where one is to convey, and the other to purchase and pay the purchase price. In the case at bar the defendant was under no obligation to purchase; he merely had an option to do so within the time prescribed. A tender of a deed was not necessary to put him in default. Under the terms of the contract, his rights had ceased to exist; and, in the absence of any equitable claim or offer to perform, he presents no defense to the action. In deciding this appeal, we confine our attention solely to the position taken by appellant.

The judgment appealed from is affirmed.

THE BUCKEYE MINING & MILLING CO. v. JOHN CARLSON
ET AL.

(16 Colorado App. 446; 66 Pac. 168. Court of Appeals. Sept. 9, 1901.)

The word lode construed by the context to mean lode mining claim.

¹On a contract to sink a shaft so many feet beyond its present depth it will be held that it was intended the contractors should keep the pitch of the old shaft and not that it should follow the vein.

²After the shaft was many feet below the point where it was alleged to leave the vein the owners made a payment in full for the work then done. This precluded them from later asserting that contractors were bound to follow the vein.

Appeal from the County Court of Boulder County.

GEORGE S. ADAMS, for appellant.

¹On a contract to sink 500 feet on the vein, the contractor may quit when the vein is found to have given out in the bottom of the shaft. *Woodworth v. McLean*, 17 M. R. 194.

Plaintiff agreed to sink a gas well 2,000 feet deep of a certain diameter. The lower part of the well fell short in diameter. Nonsuit sustained although proof that the well as bored was sufficient for testing the territory and the boring to the required diameter would only have subjected defendants to greater expense. *Gillespie Tool Co. v. Wilson*, 123 Pa. 19; 16 Atl. 36.

²In suit for the price of stone defendant counter claimed damages for unreasonable delay in delivery: Held, that acceptance and use of the stone did not defeat his counterclaim. *Schweickhart v. Stuewe*, 71 Wis. 1; 36 N. W. 605.

The defense of a defective wire rope may be waived by long delay in asserting such defect. *Roebbing Co. v. Winthrop Co.* 70 Mich. 346; 38 N. W. 310.

A party cannot accept an oil well as completed and then allege non-performance. *Ehwood Co. v. Baker*, 13 Ind. App. 576; 41 N. E. 1063.

A shaft in use is a "working shaft" whether the mine is being operated for ore, or not. *Foster v. North Hendre Co.* 1 Q. B. 71 (1891).

GIFFIN & ROWLAND, for appellees.

WILSON, P. J.

This suit was brought to recover a balance upon an account due to plaintiffs for work and labor performed by them in sinking a shaft upon a lode mining claim of the defendant company. The contract was in writing. That portion of it which is essential to the understanding and determination of the controversy is as follows:

That whereas, first party is the owner of the I X L lode mining claim in Magnolia Mining District, County of Boulder and State of Colorado, and whereas said company now has upon said lode a shaft 115 feet in depth and desires to sink the same an additional depth of 110 feet, and whereas second parties have agreed to so sink said shaft:

"Now therefore, for and in consideration of the premises, first party agrees to pay at the time and in the manner hereinafter specified to second party eleven (11) dollars per foot for sinking said shaft. In consideration whereof, second parties agree to begin work on or before the 20th day of June, A. D. 1898, and thereafter to work at least three (3) shifts per day, and that should he cease to work said property for a period of six days, such cessation will work a forfeiture of this contract, to sink said shaft an additional depth of 100 feet."

The defense is, that plaintiffs failed to comply with their contract in this, that they did not sink the shaft throughout its entire extension on and upon the vein. It seems to have been conceded that in all other respects the provisions of the contract were carried out. The position of the defendants as stated by its counsel in open court was: "That the shaft, eighteen feet from the point where they commenced work, was sunk off and away from the vein of ore; that it was sunk in the country rock. We contend, that by reason of that, that damages of defendant have arisen." All that is

said in the contract as to the location of the shaft is contained in that portion of it which we have quoted. It appears from this that there was no agreement on the part of plaintiffs to sink the shaft on the vein, and no requirement in the contract to that effect. It is a matter of common knowledge that in mining communities, among miners the word "lode" is very frequently used as synonymous with "lode mining claim." It is manifest that the word was used in such sense in this contract. It is recited in the preamble to the contract, first, that the company is "the owner of the I X L lode mining claim"; second, that it "has upon said lode a shaft 115 feet in depth and desires to sink the same an additional depth of 110 feet"; and that the second parties "have agreed to so sink said shaft." The use of the word "said" before the word "lode," qualifies the meaning of the latter, and refers specifically to what had preceded, and that was the words, "lode mining claim." It was nowhere said that the old shaft had been sunk upon, or that the extension was to be upon the lode *in* said mining claim, or the vein. Again, the only reasonable inference from the contract was that the parties could extend the shaft on the same course and in the same direction as the old one.

Conceding, however, the position of defendant to have some support, the question upon which it bases its defense was one of fact. There was a very considerable amount of testimony to the fact that the shaft as extended had not departed from the vein, and therefore, even if defendant's contention as to the meaning of the contract is correct, we could not reverse the judgment, because it was not manifestly against the weight of the evidence.

An additional reason why the judgment should be sustained is that when the shaft was extended to a depth of seventy feet, the defendant settled with plaintiffs, paying them the entire amount due them, without objection or protest, although defendant now claims that when only the first

eighteen feet of work had been done, the shaft had departed from the vein, and continued thereafter in the country rock. If there was any doubt as to the meaning of the contract, the defendant by this act placed its own construction upon it, and would be precluded from putting another and a different construction upon it, as it now attempts to do, after the entire work had been completed.

The judgment will be affirmed.

Affirmed.

JACOB FROWENFELD V. ELIZABETH HASTINGS.

(134 California 128; 66 Pac. 178. Supreme Court. Sept. 10, 1901.)

¹**Agreement between co-owners. Lien limited to mine proceeds.** The owners of a mine agreed that one owner should make certain improvement and acquire additional property, and that the other owners should not be personally liable for any part of the sum so expended, but that their interest in the mine should be chargeable with their proportion of such expenditure, and that such owners should be entitled to a certain interest in the entire property when the proceeds were sufficient to pay the sum so advanced and interest thereon, or when they paid their proportion thereof. *Held*, that such contract did not give the owner making such improvements a lien for the advances on the interest of the other owners.

Action to enforce lien distinguished from accounting. A complaint by a part owner of a mine against the other owners, stating that plaintiff and defendants were partners till a certain date, but not alleging the partnership thereafter, and stating facts tending to negative the existence of such partnership, and alleging advances made by plaintiff in improvements under a contract by which defendants were chargeable with a proportion thereof, and alleging a sum due thereunder, is an action to enforce a lien on the interest of defendants, and not an action for a partnership accounting.

Department 2. Appeal from Superior Court, Sierra County; STANLEY A. SMITH, Judge.

Action by Jacob Frowenfeld, executor of E. L. Goldstein, deceased, against Elizabeth Hastings, to establish a lien for advances on certain mining property. From a judgment in favor of plaintiff, defendant appeals. *Reversed*.

BISHOP & WHEELER, for appellant.

C. W. CROSS, for respondent.

McFARLAND, J. This is an appeal by defendant from a

¹*Beck v. O'Connor*, 19 M. R. 342.

judgment in favor of plaintiff. The action is to enforce an asserted lien upon the defendant's undivided interest in certain mining property for advances of money alleged to have been made by plaintiff's testator, Goldstein, who was the owner of an undivided interest in said property. The action is based on a certain written contract made by Goldstein, the party of the first part, and the defendant herein and Mary Martha Hickey (now Mrs. Posey), also an owner in the property, parties of the second part. A similar, independent action was also brought by appellant against Mrs. Posey, and an appeal by her from a judgment against her (Sac. 762; 66 Pac. 180) was submitted with the case at bar. A decision in one of the cases determines the other. The judgment in both cases enforces the alleged lien by decreeing the sale of the defendant's interest in the property to satisfy certain amounts of money found to have been advanced as alleged. A demurrer to the complaint was filed on the general ground that it does not state facts sufficient to constitute a cause of action, and also on several special grounds.

The contract in question, which is set forth in full in the complaint, was executed on October 17, 1885. It recites that the parties are the owners of certain mines, ditches, water rights, timber lands, sawmills, and improvements thereon, known as the "properties of the Brandy City Mining Company," and that Goldstein owned ten-twelfths undivided interest therein, defendant Mrs. Hastings one undivided twelfth, and Mrs. Hickey an undivided twelfth. It then recites that during six years next preceding the date of the contract the expenses of working the property had exceeded the value of the products "in a considerable amount (the exact amount being shown by the books of the company), of which the share chargeable against the interest of said Elizabeth Hastings is one-twelfth, and the share chargeable against the interest of Mary Martha Hickey is one-twelfth"; and that it was deemed advisable for the development of the property

to run a certain tunnel, and to make other improvements, and perhaps to acquire other properties, which would require the expenditure of further sums of money, which Goldstein was willing to advance. It is then covenanted and agreed that "the said sum chargeable as aforesaid" against the one-twelfth interest each of Mrs. Hastings and Hickey "shall remain as a charge against their several and separate interests in said property," and that their respective parts (one-twelfth each) of money which had been advanced and paid out by Goldstein over and above the amounts which he had received from the property should bear interest from the date of the contract until paid at the rate of 12 per cent. per annum. In this part of the contract there is the following clause: "It is distinctly understood that said parties of the second part are not, nor is either of them personally liable to said party of the first part for the payment of said sums of money, or any part thereof."

In the subsequent and more important part of the contract it is provided that Goldstein is to advance all such moneys as from time to time shall be required for the construction of the tunnel and other purposes above mentioned, and to pay and discharge all debts "contracted by him" for such purposes, so that there shall be no suit or liens against the company, and "and no liability incurred by, and no suits brought against, said parties of the second part by reason of any expenses incurred" for such purposes. Interest is to be allowed Goldstein for advances made at 12 per cent. per annum. Then it is provided as follows: "Whenever the proceeds resulting or to result from the working of said properties shall be sufficient to discharge all the advances hereafter to be made by the said party of the first part, and the profits from said one-twelfth interest belonging to said Elizabeth Hastings shall be sufficient to pay and discharge the amount already chargeable against said interest, as shown by the books of the company, with interest on such part thereof as is for advances

actually made in cash by said party of the first part, or whenever the said Elizabeth Hastings, her heirs or assigns, shall pay to the party of the first part, his heirs or assigns, her just proportion of all sums of money advanced by him and chargeable against her said interest, she shall be entitled to her said one-twelfth interest in all of said properties, and in all properties that may be hereafter acquired as a part of the properties of said Brandy City Mining Company (free from all liens in favor of the party of the first part, or any other person or persons, existing by reason of any act of said party of the first part), and shall be entitled to receive one-twelfth of all the profits thereafter arising from said properties; but there shall not be, in any event, any personal liability or responsibility on the part of said Elizabeth Hastings, her heirs or legal representatives, for said advances, or any part thereof, or the interest to grow due thereon." There is a similar provision as to Mrs. Hickey. The foregoing are all the provisions of the contract necessary to be at this time mentioned.

Respondent contends that by this contract an equitable lien is created in his favor against appellant's interest in the property, and appellant contends that it does not create any kind of lien, legal or equitable, known to the law. We need not, however, determine whether or not any possible lien as security for the performance of some act can be discovered in the language of the contract; for it seems clear that it at least does not create a lien for the security of any obligation which respondent has broken. If the contract creates a lien at all, there has been no breach of any condition which would make it enforceable. A lien is well defined in section 1180 of the Code of Civil Procedure as follows: "A lien is a charge imposed upon specific property by which it is made security for the performance of an act." Now, in the case at bar appellant did not covenant for the performance of any act whatever, unless it may be said that she impliedly promised to

allow Goldstein to manage and control the property, and to apply her share of the products or income of her one-twelfth interest to the satisfaction of his advances; and there is no averment or pretense that she did not comply with such promise,—on the contrary, it affirmatively appears that she did. We need not inquire what rights respondent would have had under his asserted lien if appellant had violated this promise. It is expressly provided in the contract that “there shall not be, in any event, any personal liability or responsibility on the part of said Elizabeth Hastings, her heirs or legal representatives, for said advances, or any part thereof, or the interest to grow due thereon.” How, then, can there be a lien for these advances,—for the performance of an act which respondent never promised to perform? It is true, as counsel for respondent says, that there may be a lien for the security of money without any absolute personal liability beyond the value of the property, as in the case of what is sometimes called a “dry mortgage,” and other similar instances. But in all these cases there can be no foreclosure until a breach of condition by the failure of the party to exercise the option to pay the debt or to perform the act in the manner and at the time expressly or impliedly agreed upon. There is, in such cases, an existing liability, which a party must either meet, or allow the property charged to be taken, and thus escape personal responsibility. As was said in a New York case, “it is not essential that the personal remedy against a mortgagor shall be reserved. There is a debt quoad the redemption, but not in respect to the personal remedy.” *Brown v. Dewey*, 1 Sandf. Ch. 72. A lien cannot be enforced for anything other than the thing for which it was given. In the case at bar, if any lien was created by the contract, it certainly was not for any debt or liability from appellant to respondent for advances, for there never was to be any such debt or liability. The advances were to be satisfied out of a special fund,—that is, the “proceeds” of

the work of the mine and the "profits" from appellant's one-twelfth interest,—and, if there was any lien at all, it was only for the enforcement of that mode of satisfaction. There was no guaranty by appellant of the sufficiency of the fund.

Respondent discusses to some extent the general law as to partnership, and the special provisions of the Code as to mining partnerships; but we cannot see how the law of partnership has any applicability to the case at bar. There is an averment that down to the date of the contract,—October 17, 1885,—Goldstein, Hastings, and Hickey were mining co-partners, although there is no averment that they were mining co-partners thereafter, and other averments of the complaint indicate that they were not such co-partners after that date. This averment seems to have been of no consequence whatever. The action is in no sense a bill to enforce a partnership lien. It is based entirely on the said written contract and agreement. The averments are that "by virtue of and in pursuance of said agreement" Goldstein advanced certain moneys; that the moneys in question were expended "as contemplated by and provided for in said written contract"; that one-twelfth of said advances "is now due and unpaid from said Elizabeth Hastings on account of said agreement"; that "under and by virtue of said written agreement" one-twelfth of a certain sum of money is now due from Mrs. Hastings to plaintiff. The action is for the enforcement of a lien alleged to have been created by the written contract against appellant's undivided interest in the described property, not for a partnership accounting.

It is not necessary to inquire whether the views above expressed apply also to the comparatively small amount alleged to have been due from appellant before the date of execution of the contract, for that amount is clearly barred by the statute of limitations, which was pleaded by appellant.

For the foregoing reasons, we are of the opinion that the complaint does not state facts sufficient to constitute a cause

of action, and that the demurrer to the same should have been sustained. It is not necessary, therefore, to discuss the many other points made by appellant.

The judgment appealed from is reversed.

TEMPLE, J., and HENSHAW, J., concurred.

¹WILLIAM S. ELDER ET AL. V. THE HORSESHOE MINING & MILLING CO. ET AL.

(15 South Dakota 124; 87 N. W. 586. Supreme Court. October 2, 1901.)

²Advertising out co-tenant. Ninety days' notice. Publication in a daily paper for 85 consecutive days, *Held* a compliance with R. S. § 2324, providing for forfeiture for non-contribution to annual labor, which requires a publication "at least once a week for ninety days."

Appeal from Circuit Court, Lawrence County; JOSEPH B. MOORE, Judge.

Action by William S. Elder, administrator, and others, against the Horseshoe Mining & Milling Company and

¹Affirmed 194 U. S. 248 the opinion not only affirming the point decided in the text case but other points made on the original appeal (9 S. Dak. 636) that several years' defaults may be covered in one notice, that there is no saving clause as to minor heirs and that the heirs need not be named.

²A certificate filed under the Act of 1898 in favor of Volunteers in the Spanish War, is equivalent to doing the annual labor and revives the claim although no work had been done in the preceding year. *Field v. Tanner*, 32 Colo. 278; 75 Pac. 916.

Where defendants prevent performance of the work by plaintiff, they are estopped to set up his failure to do the work to support their title. *Id.*

Where a party agreed to convey mining claims and an undivided interest was held by forfeiture for failure of co-tenant to contribute. *Held*, that the printer's affidavit of publication made proof of forfeiture and of a marketable title without anything appearing of record to go on the abstract. *Riste v. Morton*, 20 Mont. 139; 49 Pac. 656.

The newspaper nearest the claim mentioned in the Statute is not the newspaper more distant in fact though nearest by the usually traveled route. *Haynes v. Briscoe*, 21 M. R. 720.

Where the notice designates two claims the amount done on each must be stated. *Id.*

others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

FRANK L. McLAUGHLIN and MARTIN & MASON, for appellants.

EDWIN VAN CISE, G. C. MOODY, and C. E. DE LAND, for respondents.

HANEY, J. In this action the plaintiffs seek to establish title to an undivided one-half interest in certain mining ground heretofore patented as the North lode, and to compel the defendant the Horseshoe Mining & Milling Company to convey such interest. Defendant appealed from a judgment in favor of the plaintiffs, which was reversed by this court. 9 S. D. 636, 70 N. W. 1060, 62 Am. St. Rep. 895. The action having been again tried by the court without a jury, judgment was rendered in favor of the defendants, and the plaintiffs appealed.

An extended statement of the facts will be found in our former decision, where it was held that notices of forfeiture addressed, "To Rufus Wilsey, his heirs, administrators, and to all whom it may concern," were sufficient in form to divest the plaintiffs of their title to the ground in controversy. It is now contended that these notices were ineffectual, for the reason that they were not published during the entire period prescribed by the federal statute. The notices were published every day except Sunday from Monday, January 7, 1889, to Tuesday, April 2, 1889, both inclusive. The statute reads as follows:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if

at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures." Rev. St. U. S. § 2324.

Our attention has not been called to any case wherein the language of this statute has been construed with reference to the question here presented, nor have any cases been found wherein the same language has been so construed. It is evident that the notice by publication shall continue during 90 days. The phrase, "for at least once a week for ninety days," should be rendered, "at least once a week during ninety days;" that is to say, there shall be at least one publication in each week during the prescribed period. In other words, notice shall continue 90 days, and one publication each week constitutes the notice required. Necessarily, the 90 day period begins with the first publication. In the case at bar it began on Monday, January 7th. The publication on that day was sufficient for the week beginning on that day. Publication on the following and each succeeding Monday would certainly constitute at least one publication each week while so continued. There was a publication on each Monday from January 7th to April 1st, both inclusive. If no publication was required after the first until the following Monday, none was required after April 1st, until the following Monday, April 8th, and on that day the period of 90 days had been completed. Including the first day of publication, 90 days ended on Saturday, April 6th. Excluding the first day, 90 days ended on Sunday, April 7th. On that day the required notice had continued during 90 days, and another publication on Monday, April 8th, was wholly unnecessary. Conceding that the statute should be strictly construed, we think there was a complete compliance with its provisions respecting the duration of the publication:

The judgment of the circuit court is affirmed.

MARGARET DENNISTON ET AL. V. JOHN C. HADDOCK.

(200 Pennsylvania 426; 50 Atl. 197. Supreme Court. Oct. 11, 1901.)

- ¹A conveyance of coal in place is not necessarily a sale, and the rules applicable to sales, are not to be applied indiscriminately to instruments which are leases, though in fact sales in form. Each instrument is to be construed like any other contract by its own terms.
- A lessee who by payment of minimum royalties has paid more than the royalty per ton would amount to, after he accepts a new lease cannot offset such past payments against the royalties accruing under the new lease.
- ²Time in a lease in respect to the length of the term is a limitation of the estate, and always of the essence of the conveyance.

Appeal from Court of Common Pleas, Luzerne County.

Action by Margaret Denniston and others against John C. Haddock for royalties under a lease of coal in place. Judgment for plaintiffs. Defendant appeals. Affirmed.

¹Lease of coal construed as a sale of the coal and lessee held liable for taxes assessed on the unmined coal. *Delaware Co. v. Sanderson*, 109 Pa. 583; 1 Atl. 394. *Sanderson v. City of Scranton*, 105 Pa. 469.

Leases for 100 and for 99 years construed as a sale of the coal. *Kingsley v. Hillside Co.* 144 Pa. 613; 23 Atl. 250. *In re Lazarus Est.* 145 Pa. 1; 23 Atl. 372. *Plummer v. Hillside Co.* 160 Pa. 483; 28 Atl. 853.

The grant of the right to mine coal though called a lease is in effect a sale of the coal. *Hope's App.* (Pa.) 3 Atl. 23.

A demise of all the coal is a sale of the coal and the royalties are to be regarded as purchase moneys and not as rents. *Fairchild v. Fairchild* (Pa.), 9 Atl. 255.

To the contrary of the above citations and in conformity with the text case is *Genet v. Delaware Co.* 136 N. Y. 593, and *Raynolds v. Hanna*, 55 Fed. 783. The latter case was reversed on other points, 59 Fed. 923. The cases are collated in Lindley § 861 and Snyder § 1165.

See note to *Blakley v. Marshall*, 18 M. R. 350.

²The true date of a lease, when material, may be proved by parol. *Vanderlin v. Hovis*, 152 Pa. 11; 25 Atl. 232.

From the record it appeared that on September 27, 1870, Margaret Denniston, and others executed a lease of coal to Charles Hutchison, whose interest became vested in John C. Haddock. This lease was for twenty years and provided for the payment of a minimum royalty. It appeared that Hutchison and his successors in title paid royalties during the whole term of this lease, but on account of strikes and other circumstances were prevented from mining coal to the full extent of the minimum paid. On September 22, 1891, the lessors executed a new lease which was to take effect October 1, 1891. Haddock, the lessee, was continuously in possession of the property during the term of both the old and new lease, and the period between them. He claimed to defalk the overpayments under the old lease amounting to \$15,000, from the royalties due under the new lease.

The referee refused to allow such defalcation and exceptions to his report were overruled by the court.

H. W. PALMER, S. J. STRAUSS, and F. W. WHEATON, for appellants.

WILLIAM S. McLEAN and D. O. COUGHLIN, for appellees.

MITCHELL, J. It has been said in a number of cases that a conveyance of the right to mine and remove all the coal in a given tract of land is a sale of the coal in place, although the conveyance may be called a "lease." The expression is unfortunate, for, while it may have produced no erroneous result in the cases where it is used, it tends to substitute the general rules appertaining to sales for the rules properly applicable to the particular contract that may be under consideration by the court. Thus, for example, in *Hope's Appeals*, 29 Wkly. Notes Cas. 365, which is practically the starting place of the error, the agreement, though called a "lease," was a purchase of the coal at a fixed price per acre,

making a liquidated gross sum, which was payable absolutely in installments ending within 13 years, though the lessee had a nominal term of 99 in which to remove the coal. It was justly said by the learned court below, whose decision was affirmed here, that it was "manifest that the parties contemplated an actual sale of the coal, and not a lease, in the ordinary use of that word." In *Sanderson v. City of Scranton*, 105 Pa. 469, the lease was expressly made "perpetual until all the coal under the tract is mined"; and it was held that this was such a complete severance that the taxes of the city of Scranton on the coal in place were chargeable to the lessee, and not to the lessor. So, in *Kingsley v. Iron Co.*, 144 Pa. 613, 23 Atl. 250, it was again held that there was such a severance that occupation of the surface was not an adverse possession, even against a lessee who had not opened up or entered on actual possession of the coal.

With the decisions in these cases no fault can be found, but the expression that a conveyance of coal in place, even by a lease for a limited term is a sale, is inaccurate, as a general proposition of law, and unfortunate, from its tendency to mislead, which is apparent in some of the subsequent cases. Whether it would be better to call such an instrument accurately what it certainly was at common law, a "lease without impeachment of waste," or to endeavor to reconcile all the decisions by calling it a "conditional sale," is not necessary at present to discuss. The point to be noted is that the rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms.

The defense in the present case is an ingenious misapplication of the principle of a sale. Appellant, in compliance with his obligation under the lease, paid a minimum royalty each year, and at the end of his term had paid more royalty than would have been required by the coal actually mined. He remained in possession of the land for a year under ar-

rangement with one of the owners, and then took a new lease, under which the royalties now sued for accrued. He now claims to defalk the overpayment under the old lease, on the ground that he had paid for the coal, and was entitled to it without further charge, because under his continued possession he could take it away without a trespass. The defect of this view is in the assumption that he had paid for the coal. He had not. He had paid his rent on the stipulated terms, but he had paid nothing for the coal in place. His sole claim and title to that was to mine it during the term of the lease. As to it he was in the position of a lessee of a house bound to pay rent whether he occupied it or not. The fact that he paid without occupying it would not excuse his liability for further rent if he accepted a new lease.

Appellant admits that, if he had gone out of possession at the termination of his lease, he would have had no further claim to the coal, but his reason assigned is not the correct one. The right to remove the coal would have ended, not because the lessee had forfeited or abandoned his property in it, but because he had never acquired any such property; his right to do so being expressly limited to the term covered by the lease.

There is no analogy to the case of trade fixtures. Such fixtures start as the property of the tenant, and remain his until he forfeits them by failing to detach them from the realty while he is in possession. Here the coal never was the appellant's, and his only right to acquire it was limited to the term.

Nor can the argument that time was not of the essence of the contract prevail. The principle invoked is not applicable. Time in a lease in respect to the length of the term is a limitation of the estate, and always of the essence of the conveyance.

Judgment affirmed.

MICHAEL NOONAN ET UX. V. C. PARDEE.

(200 Pennsylvania 474; 50 Atl. 255. Supreme Court. Oct. 11, 1901.)

The right by deed to mine the coal subject to the condition that the surface shall not be broken or displaced is no enlargement of the miner's right, but leaves him to the liability as by common law.

The owner of the subjacent estate owes support to the surface absolutely without regard to good or bad mining or the amount of coal that remains ungotten.

¹When cause of action accrues. A cause of action arises for failure to afford the surface sufficient support at the time when the coal is removed without leaving sufficient support, and this is the case although the owner of the surface may have been ignorant of the violation of his right to support: *Lewey v. Frick Coke Co.*, 166 Pa. 536, distinguished.

The owner of the surface has a right of access to the mine below the surface to see that his right of surface support is being maintained.

Statute of limitations. Where a mine operator fails to furnish sufficient support, the right of action against him is barred after the expiration of six years. If the injury has been partly due to mining before six years prior to suit brought, and partly to mining after that date, the action will not be barred.

The date of a "cave in" is not the date of the cause of action, that is only the consequence of a previous cause.

The right to sue passes to the surface owner who is in possession when the subsidence occurs, without regard to the date of his conveyance; this right is barred by the statute of limitations if the cause of the subsidence arose more than six years before suit brought.

²A mine operator is not liable for injury to the surface by default of his predecessor in possession, though the surface does not show any injury till after he takes possession.

Runs with the land. A grantee of the surface may recover for injury thereto for failure of the mine operator to leave proper support, though such failure occurs before his deed, the effect on the surface appearing only after the deed.

New work. Robbing pillars. Where the coal had been mined more than the statutory period without subsidence until the pillars had been

¹*Hall v. Duke of Norfolk*, 20 M. R. 636.

²As to injuries remote in result see *National Co. v. Minnesota Co.* 17 M. R. 44, and notes.

robbed or a new seam worked within the statute, the action is not barred.

The measure of damages for failure to furnish surface support is the actual loss the owners of the surface have sustained to their land, including the buildings thereon by reason of the cave in. The difference in the market value before and after the injury, in this class of cases, is not the true rule.

Evidence that the cave was caused by removal of lateral support by defendants mining in the neighborhood is not admissible under a pleading charging only vertical support.

The law of lateral and of surface support differs in certain respects and the measure of damages is not the same.

Amendment to take the case out of the statute of limitations by alleging new cause of action, not allowed.

Appeal from Court of Common Pleas, Luzerne County.

Action by Michael Noonan against Calvin Pardee, administrator. Judgment for plaintiff. Defendant appeals. Reversed.

HALSEY, J., charged in part as follows:

Michael Noonan and Margaret Noonan, his wife, have brought suit here against C. Pardee, administrator of Arlo Pardee, deceased, and Frank Pardee, to recover damages because of injury alleged to have been done by the defendants to the plaintiffs' property in the removal of the coal underlying the same or in adjacent or proximate mining.

Of course there has been no testimony adduced here showing that any of this mining was done by Frank Pardee, and at the close of plaintiff's testimony, on motion of counsel for the defendants, a nonsuit was entered as to Frank Pardee. Therefore he is eliminated from your consideration in reaching a disposition of this case. The salient facts, gentlemen of the jury, out of which this contention grows, are as follows: On January 11, 1892, Michael Noonan and his wife jointly owned the property in Hazleton, being lot No. 9 in square 61. On the evening of that day a subsidence or a settling of the surface occurred by reason of which this property was alleged to have been injured. It was occupied at the time by Noonan and his wife, Mr. Helferty and his family on the one side and by a tenant on the other, whose name I think was Dugan. It was a double house, three rooms I think on the lower floor and three on

the upper floor, with the ordinary halls on either side. The injury to the property by this subsidence, settling or cave has been described to you in detail by the different witnesses in the case. Mr. Helferty has described it more distinctly than any others, and he testifies to you that there was a general racking of the house and a settling of it from one to two feet. The walls and the sides of the house were thrown out of place. The plaster was cracked, the superficial character of the lot, the water courses and the drainage, were changed, resulting, as the plaintiff alleges, in injury to the property. It has been shown that the mining operations in the mines generally under and adjacent to that property from 1858 to 1895 were carried on by Arlo Pardee & Company and other parties; possibly by Arlo Pardee & Company from 1874 down to 1895. The law as to the duty of the defendants, or operators of these mines, is, that in order that the plaintiff may recover here you must find that the subsidence, crush, cave or accident came from mining operations carried on by the defendants—by Arlo Pardee & Company. There can be no recovery against them unless the mining and the removal of the coal was done by them or through their agent or agents. (If the defendants carried on mining operations in any portion of these mines which resulted in the accident or cave which did the injury to the plaintiffs' property, then you would, under the law, be justified in finding a verdict in plaintiffs' favor for the amount which you find to be the money value of such injury.) (3) The plaintiff was the owner of the surface, and not of the coal. Owners of the surface are, under the law, entitled to the possession of the surface free from any injury that may be done thereto by the owners of the coal in the mining and removing of the same. In other words, if the coal is removed by the owners, they must remove it so as to do no injury to the owners of the surface. It is the duty of the owners of the coal to support the surface when they so mine the coal. The immediate mining under this property was in the Mammoth vein in the first lift, and I think also, gentlemen of the jury, there was testimony in the case that there had been mining in the Wharton vein. The Mammoth vein was about 100 feet below the surface of the lot of the Noonans, and the Wharton was some fifty feet below the Mammoth, so that the Wharton was 150 feet below the surface of the Noonan lot. From the mine inspector's map it appears that no immediate mining was done in this vein since 1858—that is, in the Mammoth. It would appear generally from the testimony that the injury complained of here did not come from the immediate mining and its consequences. Did it come from any other source? Mr. McNair has testified (and he is a mining engineer and has been in charge of these mines and knows all about the inside operations of them) that there was no immediate mining under this property

to the best of his judgment since 1858. (If you should find that this injury did not come from immediate mining under the property, did it come from the general mining carried on by these defendants in the Hazleton mines which were generally a part and parcel of these mines? If it did, and you should so find, then these defendants under the law would be liable in damages for the amount of the injury which you find the plaintiffs sustained.) (4) You have heard the theories as to the cause of the injury to this property. There is no question that there was a subsidence, a cave, a settling which caused injury to this property. Was this injury done by these defendants? If it was then we say to you as a question of law it is your duty to proceed to the other question and ascertain the amount in money of the injury the plaintiffs may have sustained. (The measure of damage is the market value; and market value has been defined as a price established by public sales in the way of ordinary business. The market value is such a sum of money as the property is worth in the market to persons generally who would pay the just and full value. What is meant by the market value is not the price the land would bring at a forced sale, but what it or land similarly situated would bring at a sale after due notice and under fair conditions. In getting at the damage sustained by the plaintiffs, you will take into consideration that which has been done in the way of making reparation—the repairing of the property injured. The evidence has been adduced here that the injury, the damage done to this property, has been repaired at the expense of the Lehigh Valley Railroad Company. How far did that go toward a reparation of the injury? You heard the testimony of witnesses who have come into court here and told you as to the character of the injuries, as to what was done in the reparation of them, and the effect of the repairs. Mr. Rousch, a contractor of many years' residence in the city of Hazleton, has told you that the injury has been substantially repaired. Mr. Boyle, a contractor who has lived in the locality for many years, testifies to the same effect. There is no testimony here on the part of the plaintiff that he objected to the repairs or that he complained that they were insufficient. Now, were they sufficient and did they repair the injury done to this property by reason of this subsidence? There is the further testimony in the case as to the injury done to the market value, as I have defined it to you. Witnesses have been called here to testify as to the market value before the injury, and the market value after the injury, after the excitement incident to the accident has been allayed. This, under the rule, is a fair measure of the market value, namely, the difference between the fair market value of the property before the accident and what it was worth after the accident as affected by the accident.) (5) After the excitement incident to the accident had

subsided, after the community had ceased to have any fear arising from the subsidence, from the cave, from the settling of the mines. That was the time at which the market value should determine and fix the value of the property, not when the community was excited and disturbed and frightened and away from their homes, but after everything had quieted down, what was then the market value of this property?

Verdict and judgment for plaintiff for \$2,790. Defendant appealed.

JOHN G. JOHNSON and HENRY W. PALMER, for appellant.

JOHN T. LENAHAN, THOMAS W. HART, and EDWARD A. LYNCH, for appellee.

DEAN, J. The plaintiffs purchased a lot by deed of April 22, 1890, in the borough of Hazleton, Luzerne county, and erected upon it a dwelling house. While they occupied the house, on the 11th of January, 1892, the ground under it and in the neighborhood subsided, leaving a saucer-like depression about three feet deep in the middle, and extending over about two acres. The subsidence or cave-in was caused by the mining of coal by the defendant, or his predecessors, under the subsided land; whether immediately under plaintiff's lot or at some distance is in dispute on the evidence. It is also in dispute as to the time the mining was done which caused the immediate injury. The plaintiff's deed was from one McAllister, whose title ran back through several grantors to one Michael Dugan, the last-named grantee's deed being from the Lehigh Valley Railroad Company, and is dated July 31, 1869. At that date the company was owner of both the surface and the coal underneath. In the deed is this provision:

"And it is hereby made a condition of this grant, and expressly covenanted and agreed, that the said Lehigh Valley

Railroad Company, their successors and assigns, do except and reserve, and shall always possess, the exclusive privilege of mining under the lot of land herein conveyed for coal and other minerals, and for that purpose may extend such tunnels, drifts, or excavations under the same, or any part thereof, as shall be necessary or convenient for the mining and removal of such coal or other minerals, subject to the condition that the surface earth covering such coal or other minerals shall not be in any manner cut, broken, or displaced; and that every damage which may be done to the said lot, or the buildings erected thereon, by the exercise of the mining privileges herein reserved, shall be made good by the said Lehigh Valley Coal Company."

The defendant's testator had, about the year 1874, become the lessee of the coal from the Lehigh Valley Railroad Company. It will be noticed that this was many years before the plaintiff's conveyance of April 22, 1890. At the date of the injury, defendant was in possession of and operating the mines.

We do not think the stipulation in the railroad company's deed, so far as the evidence in this case is concerned, modified the defendant's liability as an operator or miner of the coal underneath the surface. The covenant in the deed neither expressly nor impliedly relieved the covenantor, or its lessees, from the duty of leaving sufficient support for the surface. It is little more than a reservation of the coal for itself and assigns, and a stipulation for the performance of a common-law duty on its part and that of its assigns.

There was evidence that the mining which caused the injury had been done directly underneath the plaintiff's lot many years before the date of his deed, and that none was done afterwards; and there was evidence on the part of the plaintiff that considerable mining had been done underneath after their occupation. In both aspects of it, this evidence had a direct bearing on the issue as made up by the

pleading. The suit was trespass against the lessee of the railroad company.

The declaration is as follows: "On the 11th of January, A. D. 1892, the said defendants, under a grant of coal under said lot, said grant being made subsequent to the deed from said company to said Dugan, removed the coal under the surface earth of said lot No. 9, and so cut, broke, and displaced the earth that the surface fell in, and the dwelling house of the plaintiff thereon became greatly damaged, whereby the surface of said lot No. 9, of the value of \$1,500, was wholly destroyed, and the house thereon damaged in \$3,000; wherefore plaintiff claims from defendant \$4,500." The injury, and only injury, here alleged is that defendant removed the coal under the surface of lot No. 9, and to that averment only did the defendant plead. He averred and argued that no mining had been done by him after the plaintiff's purchase and occupation of lot No. 9; yet the latter was permitted to recover on evidence showing a removal of the coal antedating his deed,—a fact not averred. If the cause of the injury was bad mining before the 11th of January, 1892, or the failure before that date of defendant, while mining, to leave sufficient props and supports for the surface, while the cave-in only occurred at that date, those who mined the coal would be clearly answerable. In this case it is alleged this defendant mined the coal either before or after the plaintiff's deed. If the mining which caused the subsidence was more than six years before suit brought, and the injury occurred within six years, even though the miner or operator was still in possession, he is not answerable in damages, for there is no right of action for damages until the damage occurs.

The first question raised by the assignment of error is, what was the date of the cause of action? A cause of action is that which produces or effects the result complained of. Where there has been a horizontal division of the land, the owner of the subjacent estate, coal or other mineral, owes to

the superincumbent owner a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility. What the surface owner has a right to demand is sufficient support, even, if to that end, it be necessary to leave every pound of coal untouched under his land. *Berwind v. Barnes*, 13 Wkly. Notes Cas. 541. Also the English case, *Harris v. Ryding*, 5 Mees. & W. 60, in which Baron Parke uses this language: "I do not mean to say that all the coal does not belong to the defendants, but that they cannot get it without leaving sufficient support." We have followed rigidly this rule, as thus tersely suggested, in all our decisions on the subject, and they have been many. Of course, defendant had a right to all the coal under this lot, but he had no right to take any of it, if thereby, necessarily, the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface. So there is nothing gained by adducing evidence of good or bad mining, or by a discussion of that subject.

The adjacent owner in this case at sometime failed in duty to the owner of the surface of this lot. The mere fact that it caved in because the coal had been mined underneath demonstrates this failure. When the coal was removed without leaving sufficient pillars, or without supplying sufficient artificial props, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above. And from that dates the cause of action. Unless, when the coal was mined, the miner left no pillars, or too few, or of too small dimensions for such mine, or did not replace the coal with ample artificial durable props, there was no cause of action; for, as is said by Earle, J., in *Bonomi v. Backhouse*, 96 E. C. L. 642: "As a general principle, it is difficult to conceive a cause of action from damage when no right has been violated and no wrong has been done." That was also a mining case. It was held that the check upon

mining was for the protection of the surface, and that "the surface owner, taking that advantage, may not unreasonably be held to take it with ordinary legal incidents; among others, a liability to be barred by six years from the wrongful act. In case of mining operations which are a trespass, the statute runs from the trespass, though the party may have been ignorant of the act done. The same rule may, with equal justice, apply to a surface owner notwithstanding he may have been ignorant of the violation of his right to support." This opinion was concurred in by the other two justices, Campbell and Coleridge, but on appeal to the house of lords, the judgment was reversed; so in that case the final judgment, in effect, declared that the date of the cave-in was the date from which the statute began to run. There are other English cases to the same effect, and others directly to the contrary. So conflicting are the decisions that the law on the subject in England cannot be considered settled. Cases on each side, including *Bonomi v. Backhouse*, have here been cited by both appellant and appellee. We think the opinion of Erle, J., from which we have quoted, by far the most satisfactory in its reasons, and more in accord with the conditions of coal mining in this country; and, as we are not bound by the final judgment in the law of England, we prefer to follow the opinion which meets our view of the law applicable to the facts before us. This court refused to follow *Bonomi v. Backhouse* in the late case of *Lewey v. Coke Co.*, 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684. But this last case is clearly distinguishable from an action for failure to afford the surface sufficient support. *Lewey v. Coke Co.* was where the defendant from an adjoining mine had mined and removed the plaintiff's coal underneath his land, yet did not disclose the fact, and plaintiff did not discover it until after the six years had run. We held, on the facts of that case, that the statute only began to run from the time of plaintiff's discovery, and this on the grounds

that the mining of his coal was a wrong, and the concealment of the wrong a fraud. He had no means of discovery; had no right of access to the mine to make observations, and defendant no right at all under his land; he had no reason to suspect or presume that one who had no claim of right would wrongfully enter on his land, and dig his coal. But here the parties who mined this coal had a right so to do; a right reserved by the original owner. The surface owner, too, had a right of sufficient support. These mutual rights gave the surface owner access to the mine to see that his right was being maintained by the performance of the duty owing to him by the coal operator. And the courts will enforce this right of access if the mine operator denies it. This has been decided in a number of cases. In this case the right of action arose when the mine operator failed to furnish sufficient support. That may have been more than six years before suit brought, or it may not. It may have been partly due to mining before and partly to mining afterwards; in which latter case the action would not be barred. If wholly due to the removal of coal six years before suit brought, and failure then to leave sufficient support, the action would be barred. The date of the cave-in and partial destruction of the house is not the date of the cause of action, that was only the consequence of a previous cause, whether one month or twenty years before. It is argued that in some cases the surface owner could not know by the most careful observation whether the mine owner had neglected his duty within six years. We answer, that is only one of the incidents attending the purchase of land over coal mines. It is not improbable that this risk enters largely into the commercial value of all like surface land in that region. But, however this may be, we hold that the miner is not forever answerable for even his own default. Further, in no case is he answerable for the default of his predecessor before his possession. Neither equity nor law demands that any greater burden should be placed upon

him than that indicated. Any heavier one would encourage the purchase of surface over coal mines for speculation in future lawsuits. We cannot concur in the argument of appellant's counsel that plaintiffs could have had no cause of action antedating their deed. By their conveyance, there passed to them all the rights of their grantor. If the cause of the injury was within six years, although at the date of the deed the damage was not susceptible of computation, yet afterwards became so by the subsidence of the surface, their right to sue was then fixed; a right which, from the nature of the case, could not have had more than a doubtful existence before the actual damage occurred. We do not think *Turnpike Road v. Brosi*, 22 Pa. 32, cited to sustain the argument that the right to sue does not fall to the owner who is in possession when the result demonstrates the cause of action arose before the date of the deed, is in point. Justice Lewis, in that case says: "It is certainly true that the purchaser of an estate cannot claim damages for an injury done to it before his purchase. Such claim is a chose in action, which remains in the hands of the vendor. The vendee is presumed to pay less for his estate on account of the injury, and has, therefore, no claim to recover damages for it." But he is speaking there of the damages arising from the exercise of eminent domain by turnpike and railroad companies. In all such cases the injury is palpable. When the corporation enters upon the land, and makes its survey, it then appropriates. The extent of its excavations and embankments, as well as the quantity of land to be occupied, are as well known then as months afterwards, when the work is done. There is no reason why the grantee of the land, in the interval between the appropriation and the completion of the work, should be compensated in damages, when he has probably gained a reduction in price, because of the damage, equal to the amount of damage.

But none of these reasons appear in this class of cases.

When the right to sufficient support has been violated, the cause of action, it is true, arises, but the owner in possession when the consequences follow is the one who suffers. There may, in the interval, have been several owners, none of whom sustained damage except the last. He alone has the right to sue, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession. Until they actually occur, no one can tell when they will occur, or that they ever will. Each grantee has the right to presume that the subjacent owner has performed his legal duty; and the price while probably somewhat depreciated by the possible risk, is not fixed on a presumption that his land will subside because of any special failure in duty on the part of him who has taken out the coal.

There is some evidence tending to show that the cave-in was because of work within six years by defendant in the Mammoth seam, the first stratum of coal below the surface; also evidence tending to show very recent mining in the Wharton seam, the next one underneath the Mammoth; and that from one or the other cause, or from both combined, the subsidence was caused. On the whole case we deduce these propositions:

1. If the failure to furnish sufficient support to the surface was from mining, either by defendant or his predecessors, more than six years before suit, the action is barred by the statute of limitations.

2. The right to sue passes to the surface owner who is in possession when the subsidence occurs, without regard to the date of his conveyance. This right is barred by the statute of limitations if the cause of the subsidence arose more than six years before suit brought.

3. Even if the main body of the coal under plaintiff's land has been mined out more than six years before suit brought, yet, if defendant has done additional mining by removal of coal left in previous work, or by robbing of pillars

within six years before suit, and without such additional mining the surface would not have subsided during plaintiff's occupancy, yet, if such additional work or mining hastened the result, the defendant is answerable in damages therefor.

4. If defendant, by mining within six years another underlying seam (the Wharton), whereby the pillars and support left in the seam above (the Mammoth), which otherwise would have been sufficient support to the surface, have been rendered insufficient, and the cave-in occurred, defendant is answerable to plaintiff in damages.

5. If plaintiff be entitled to recover, his measure of damages is the actual loss he has sustained to his land, including the building thereon, by reason of the cave-in. The difference in the market value before and after the injury in this class of cases is not the true rule. In this case, under the evidence, perhaps it worked no injustice; but in many cases it would do so.

In a case of this character, it is of the utmost importance that the averments should be more specific as to the time the coal was mined under the lot, and as to who mined it. While, probably, we would not reverse it for this paucity in the statement, nevertheless it would greatly aid in a correct review of the case if all the grounds of action were clearly and more specifically stated.

But the learned judge of the court below went much further than instruction on the matter so meagrely averred, and which was the only issue in the case. Evidence was offered and received tending to show that defendant was mining coal at a distance from the lot in question in other parts of the Hazleton mine. From this evidence plaintiffs argued that, even if their property had not been injured from lack of surface support in the mine underneath it, the subsidence was caused at the point under the lot by removing lateral support at other mines some distance from the lot in question. There

was some evidence given to sustain this view, and the court charged as follows:

"It would appear generally from the testimony that the injury complained of here did not come from immediate mining and its consequences. Did it come from any other source? Mr. McNair has testified (and he is a mining engineer, and has been in charge of these mines, and knows all about the inside operation of them) that there was no immediate mining under this property, to the best of his judgment, since 1858. If you should find that this injury did not come from immediate mining under the property, did it come from the general mining carried on by these defendants in the Hazleton mines, which were generally a part and parcel of these mines? If it did, and you should so find, then these defendants, under the law, would be liable in damages for the amount of the injury which you find the plaintiffs sustained."

The defendant assigns this instruction for error. When we consider that there is not an intimation in the statement that any such cause for the injury ever had an existence, it is somewhat difficult to conceive how it could have been adopted as one of the grounds of recovery. Damage for failure to furnish vertical support to the surface in mining underneath is a well-known cause of injury to the surface owner; but that an adjacent owner has, by removing lateral support, caused a vertical subsidence of the surface, is an altogether different averment of the ground of complaint. He may be the same or some other than the operator of the mine underneath. His duty is not in all respects the same. The rule for the computation of damages is not the same. The authorities are in substantial accord on this question, though not giving the same reasons. *Richards v. Jenkins*, 18 Law T. (N. S.) 437, and 17 Wkly. Rep. 30; *Corporation of Birmingham v. Allen*, 6 Ch. Div. 284; *Dalton v. Angus*, 6 App. Cas. 791; *McGettigan v. Potts*, 149 Pa. 158, 24 Atl. 198. In the last cited case it is decided that:

"The rule that the owner is entitled to lateral support for his ground extends only to support for his ground in its natural state, and does not include such support for the protection of buildings or other structures placed upon it. Where, by reason of an excavation, without negligence, made by defendant on his own land, the land of the plaintiff sinks or falls away, the measure of damages is not the diminution in value of the lot of the plaintiff by reason of the act of the defendant, but the amount of injury actually done to the plaintiff's land. The measure of the damages where land is taken by right of eminent domain, which is the difference between the value of the whole of the plaintiff's land before the taking and its value immediately afterwards, has no application in such case."

We do not decide that plaintiff might not have originally embraced in the same statement this cause of action, for we are of opinion he might have done so. But he did not. He could not recover on it when he alleged but the one cause, and that a different one. It was plainly error to admit, under this statement, the evidence tending to show a destruction of lateral support. The defendant had not been called into court to answer such complaint, and ought not to have had a possible verdict on that ground against him. It is now too late, under the authorities, for plaintiff to introduce this new cause of action under an amendment, for the statute of limitations bars it. See a full discussion of this subject by Sharswood, J., in *Appeal of Wilhelm*, 79 Pa. 134.

Appellant's third assignment of error is sustained; the others are not. We have noticed them to the extent of pointing out the course the trial should take upon a new venire, so that, if possible, we may be saved from a second review.

The judgment is reversed, and a *venire facias de novo* awarded.

GEORGE B. MARKLE ET AL. v. E. P. WILBUR ET AL.

(200 Pennsylvania 457; 50 Atl. 204. Supreme Court. Oct. 11, 1901.)

¹The majority of the members of a partnership may, in case of diversity of opinion, manage the business as they see fit, acting in good faith, and within the powers necessary to the management, and not withheld by the articles of partnership, without being liable for losses which could not be foreseen.

²Tunnel and superintendent's home are legitimate expenditures. A partnership consisting of seven persons was organized to conduct the business of mining coal. The shares were divided into sixteenths, and the term of the partnership was for twenty years. On a bill in equity by two of the partners representing three and one half sixteenths against the other partners for an account, it appeared that one of the plaintiffs was a woman, and the other was engaged in banking in a distant state. Three of the defendants were practical men in the coal business and one of them, who acted as manager or superintendent, was an educated mining engineer of large experience. The evidence showed no bad faith or fraud in the management of the business. The plaintiffs claimed that the defendants should account for a very large expenditure on a tunnel over a mile long, for the cost of a dwelling house for the superintendent, for a salary of \$10,000 a year of an assistant superintendent, and for various other matters of expenditure. The evidence showed that the large expenditure for the tunnel was due to unforeseen conditions in the strata, impossible to determine beforehand; that the house was occupied by the superintendent who paid an annual rental which equaled six per cent of its cost. As to other items explanation was made tending to show that they were necessary to carry on the business successfully and for a profit. *Held*, that the defendants were under no duty to account.

³Sale of interest without retiring. Where partnership articles provide a partner may sell his interest to another partner without a dissolution of the firm, and one partner sells his interest to another,

¹*Childers v. Neely*, 20 M. R. 222.

²Instance of a mine turned over to creditors to work out a debt with consideration of what items are allowable on their final accounting. *Adams v. Lambard*, 80 Cal. 426; 22 Pac. 180.

³One owner may withdraw at any time without dissolving the partnership as to the other co-tenants and after such withdrawal the withdrawing party may sue the managing partner for his share

but stipulates that he shall retain title to the interest until it is paid for, the other partners cannot object to the vendor continuing to participate in the management of the business, if the vendee does not object.

Appeal from Court of Common Pleas, Luzerne county.

Suit by George B. Markle and others against E. P. Wilbur and others. Decree for plaintiffs, and defendants appeal. Reversed.

LYNCH, J., entered the following decree:

This case came on to be heard, and after argument of counsel and full investigation, now January 8, 1900, it is ordered, adjudged and decreed:

1. That the above named plaintiffs are entitled to an account of the several matters contained in the bill as therein prayed; and that a master be appointed by this court to state such account in detail together with a full account of the liabilities of the firm of George B. Markle & Company the amount of the assets thereof and the full amount of profits of the said firm from all sources from the first day of January, 1890, to the date of accounting, and when so ascertained the master shall report to the court a schedule of distribution of such of the net profits and earnings of the firm thus ascertained as are not necessary for the current business thereof to and among the several parties interested therein in the proportions to which they may be entitled.

2. And to the intent and purpose that a proper account may be stated by the said master, the defendants and any manager, employee, agent, depository, or superintendent of them or any of them, or of said firm, are hereby enjoined from paying out any of the earnings of said firm by way of dividends, or partial distributions of earnings of the firm on special deposit or otherwise pending the account; and they are further commanded to render unto plaintiffs a true account of all earnings of said firm including any now on special deposit to be included in the master's schedule of distribution.

of the proceeds without joining the other co-tenants. *Slater v. Haas*, 16 M. R. 201.

Associates estopped to deny that third party was not interested and that his name had been used simply because the law required three names. *Sturgeon v. Apollo Co.* 203 Pa. 369; 53 Atl. 189.

3. It is further ordered, adjudged and decreed that the defendants, E. P. Wilbur, John Markle, Ida M. Hessenbruch, and Herman Hessenbruch, her husband, John Driesbach and Edgar Twining, surviving executors of William Lilly, deceased, be enjoined from excluding the plaintiffs, George B. Markle, Clora Markle and Alvan Markle from participating in the management of the said firm, and from interfering with the plaintiffs in receiving their just share of all the net profits of the firm which they may now or hereafter be entitled to receive as partners.

4. It is further ordered and decreed that unless the property now held by the Jeddo Tunnel Company, limited, be transferred to the firm of George B. Markle & Company within ninety days from the date of this decree, that the defendants account to said firm of George B. Markle & Company for the entire amount loaned by the defendants out of the assets of said firm of George B. Markle & Company to said Jeddo Tunnel Company, limited, within ninety days from the date of this decree.

5. It is further ordered, adjudged and decreed that the defendants, E. P. Wilbur, John Markle, Ida M. Hessenbruch, John Driesbach and Edgar Twining, surviving executors of William Lilly, deceased, and any clerk, agent, manager or superintendent whom they or any of them may select be enjoined from expending the profits of the firm in any permanent improvements on the property of the firm and from impounding and holding the profits of the firm of George B. Markle & Company for the contemplated permanent improvements of the firm property as set forth in the bill without the consent of the plaintiffs, George B. Markle, Alvan Markle and Clora Markle.

SAMUEL DICKSON and HENRY W. PALMER, for John Markle, appellant.

F. W. WHEATON, for E. P. Wilbur, appellant.

W. G. FREYMAN, for J. M. Dreisbach and Edgar Twining, surviving executors of William Lilly, appellant.

JOHN G. JOHNSON, for Ida M. Hessenbruch and Herman Hessenbruch, appellants.

GEORGE WHARTON PEPPER, D. L. RHONE and J. Q. CREVELING, for appellees.

DEAN, J. We have before us in this case the paper books. Appellants' alone contain 709 pages of printed testimony and exhibits. There are, besides, appellees' paper book, and supplements on both sides. To make an intelligent decree involved a most thorough examination of all this testimony, of the papers, and witnesses.

We may note, first, that Alvan Markle is no longer a party plaintiff. After the testimony was all in, and before the court below considered it, he withdrew, substantially acknowledging he had been mistaken in his complaint. Then, when the decree he had joined in asking for was entered, he appealed from it. Further, appellants aver that George B. Markle, one of the two remaining plaintiffs, has no standing as a party, because his interest as a partner had become vested in his two sisters, Clora Markle, plaintiff, and Ida Hessenbruch, one of the defendants. As to the issue raised by this objection, it is not material in this case. The whole question was considered and finally decided in *Hessenbruch v. Markle*, 194 Pa. 581, 45 Atl. 669. Although that case was a close one, and the court by no means of one mind, we adhere to that decision, and will not "thresh that old straw over again." It would profit neither side to this appeal. Besides, no one questions that Clora Markle became the equitable, if not the absolute, owner of the moiety of her brother George by assignment from him, so that he could properly appear as a party, if she made no objection, to urge the enhancement of the value of her interest held in pledge before, and advocate her complaint as against her copartners, these defendants.

The bill sets forth that on December 30, 1889, the plaintiffs entered into partnership with John Markle, William Lilly, E. P. Wilbur, and Ida Markle for the purpose of mining coal upon lands held by the firm under lease from the Union Improvement Company for 30 years from January 1, 1890, and from the Highland Coal Company for 30

years from January 1, 1892, the interests of the partners being as follows: William Lilly, 6-32; E. P. Wilbur, 12-32; John Markle, 4-32; G. B. Markle, 4-32; Clara Markle, 1-32; Ida Markle, 1-32. The partnership was to begin January 1, 1890, and to continue to January 1, 1920. Any partner might sell his interest to any of the remaining members of the firm, but not to a third person without written consent. Assignment was not to work a dissolution, and in case of death the executors were to represent the estate. While John Markle gave his personal attention, and so long as his management should be satisfactory to all interests, he was to be allowed a salary of \$15,000 per annum.

(2) On the death of William Lilly, his executors took his place.

(3) On October 19, 1894, E. P. Wilbur sold his interest to John Markle, but persisted in attending the meetings, and voted, and otherwise fraudulently intermeddled.

(4) That E. P. Wilbur conspired with the other defendants so as to exclude the plaintiffs, and in particular resolved that they should only recognize John Markle as authorized to conduct the mining and selling of coal, the deposits of moneys, the drawing of checks, and the execution of contracts.

(5) That it was agreed at the time of the execution of the articles that John Markle would not act as manager unless his management should be satisfactory to all interests, but against protests he continues to do so, his management being unsatisfactory.

(6) As a more specific statement of gross mismanagement by John Markle the plaintiffs say:

That he declared and paid out a dividend of \$60,000, although the firm was indebted to William Lilly and others in the amount of \$80,000. In further pursuance of his evil and corrupt purposes, he employed an assistant, W. H. Smith, Jr., and secretly paid him a salary of \$10,000 a year. That

in further pursuance of the conspiracy to defraud he neglected and refused to accept pay for coal sold to the Lehigh Valley Coal Company, and that he made grossly inaccurate statements, and plaintiffs had no means of finding the true account. That John Markle and his associates built a tunnel, known as the "Jeddo Tunnel," of which they could get no true accounts; and built another tunnel, which the plaintiffs thought was worthless, but the true cost of which was unknown. That he built a house for himself at Jeddo at a cost of \$16,000, which he paid for out of the current fund.. That he made grossly inaccurate statements of the net earnings. That the books had been kept at Jeddo exclusively by John Markle and his clerks. That they could only have access to them under espionage. That no meeting of the members of the firm had been called. That John Markle had pledged to Drexel & Co. security to indemnify Drexel & Co. against his unlawful acts. The bill further alleges that John Markle is about to embark in extensive permanent improvements, which were unnecessary. The leases provided that the lessee should not transfer or assign them without the written consent of the lessor, and hence a dissolution of the firm is impossible. All the acts were a part of a plan to wholly exclude the plaintiffs from participation in the partnership management.

The prayers were:

For an injunction on defendants as follows:

To restrain Wilbur from voting or intermeddling; the defendants from excluding the plaintiffs; John Markle from acting as general superintendent, to the exclusion of the plaintiffs; the defendants from embarking in any extension of the mines, or the erection of any new breakers or machine shops, or other means of preparing or shipping coal; the defendants from paying out any money of the firm by way of dividends, earnings, or profits without the consent of the plaintiffs. Further, that the defendant be ordered to account for the cost of the Jeddo tunnel and to pay the plaintiffs their share of the excessive cost, and the entire cost of tunnel B, and all other

unnecessary improvements; that John Markle be compelled to account for the salary of Smith, paying the plaintiffs their share; that John Markle be compelled to account for and pay the share of the cost of the house; that the defendants be compelled to truly account for coal sold; that they be compelled to truly account for all profits from all sources; that a master be appointed; further relief.

The principal answer is that of John Markle, which is substantially adopted by the other members of the firm. It gives a history of the firm from its original organization, November 30, 1876, by George B. Markle, plaintiffs' ancestor, William Lilly, and Asa Packer, and quotes the provisions of the will of George B. Markle relating to the business of the firm of George B. Markle & Co. It next avers: That in November, 1880, John Markle was put in charge of the mining interests of the firm by his father, with the consent of the copartners. That the conduct of the business has been largely left to himself by Mr. Wilbur and by Gen. Lilly in his lifetime and by his executors after his death. A controversy having arisen between John and his brothers, the latter and Clara Markle had attempted to interfere with the conduct of the business, but all the other interests sustained his management. George B. Markle had assigned his interest to his sisters, and had little, if any, interest in the business. It admits that Mr. Wilbur entered into an agreement to sell his interest, but alleges that final settlement had not been made, and that he was entitled to retain his rights until then. It denies conspiracy or agreement to exclude the plaintiffs from the management, except as contemplated in the articles of partnership, alleging that the majority in interest had a right to govern. It denies that he agreed to act as manager only so long as satisfactory to all, and alleges that at the formation of the firm it was understood by all that he was to have control and direction of the business, as it would be impossible for the other partners to find time to take any

active part. George B. Markle was engaged in banking in Portland, Or., Alvan Markle in banking in Hazleton.

It quotes letters recommending distributions, which were made without objection, except as to the share of George B. Markle; states that indebtedness to William Lilly was under an arrangement for monthly repayment of a debt of \$10,000, and that there was no default to Lilly or Lehigh Valley Coal Company; denies that payments to Smith were secretly made, and alleges that they were entered on the books as other like payments; denies allegations as to Lehigh Valley Coal Company, and says that the plan pursued was the same as in force since the firm was formed, the amount left on deposit was reasonable, and books and papers in the office at Jeddo were always open to examination of plaintiffs or their authorized representatives; denies that statements were inaccurate, and alleges that plaintiffs had in their possession the information to reconcile apparent differences in the two sets of statements rendered, and explains the same; avers that the Jeddo tunnel was built in compliance with the conditions of the lease, and that tunnel B was also necessary, and that George B. Markle and Alvan Markle knew all about it; admits building house, but says it was done with the consent and approval of the majority in interest; denies having made inaccurate statements, and avers that detailed statements were submitted, and explains mistake of plaintiffs in assuming otherwise; says that plaintiffs always had access to the books, and assistance of the bookkeepers and expert accountants employed by them, and were given free access; admits that it was not the custom of the firm to hold meetings, and those called by the plaintiffs were not held at the office of the firm; explains the giving of the bond of indemnity to Drexel & Co., and states that, if it had not been done, money could not have been had to pay the wages; admits that certain improvements were under consideration, but says that no others will be undertaken without consultation; avers that

partners representing the majority in interest were acting in good faith, without any purpose to exclude the plaintiffs, but that there could only be one general manager; avers that, in view of the misconduct of the plaintiffs, they should be enjoined, or dissolution decreed.

It will be noticed that the answers are responsive to the bill, and deny every material complaint. The burden was, then, on the plaintiffs to sustain their complaint by proper proofs. We may say at the outstart that we fail to find any evidence of dishonesty, bad faith, conspiracy, or overreaching by defendants, or any one of them. There may have been mistakes of judgment in planning and conducting the business, but there was no unfairness or dishonesty. The plaintiffs, if they get such relief as they ask, must get it because of gross mismanagement of the partnership business, or because of wholly unauthorized acts in conducting the business.

We do not understand that the court below found as a fact that defendants in any instance acted in bad faith towards their copartners, but it does find that they expended the partnership money extravagantly, and without authority, in improvements and salaries, against the protest of the minority. The substance of its findings of facts and conclusions of law on which the decree is based is contained in its conclusions of law first to fourth, inclusive, as follows:

"1. That E. P. Wilbur has not been a member of the firm of G. B. Markle & Co. since the 25th day of October, 1894, and that his participation in the business of said firm as a member since that date has been illegal and unwarranted, and that he must be restrained from further acting as a member of said firm.

"2. That since the 19th day of October, 1892, John Markle had no authority to act as general superintendent and manager of the firm, to the exclusion of other members of the firm, and that his assumption of the position of general superintendent and manager of the firm of G. B. Markle & Co. since that date has been illegal and unwarranted.

"3. That a majority of the members of the firm of G. B. Markle & Co. were and are vested with the power, after meeting bona fide

to consult upon business of the firm, to do all those things necessary for successfully carrying on the business contemplated in the articles of copartnership; but they have not the power under the articles of copartnership to make permanent improvements to the property, nor to establish a surplus fund for the purpose of making future improvements, nor to establish an insurance fund, nor to build a house for one of their members, nor to employ clerks at excessive salaries to act as assistant superintendent, nor to do any other act not contemplated in the articles of copartnership, and necessary for the successful operation of the ordinary business of the firm, without the consent and against the protest of the minority of the members.

"4. That all the partners in a partnership like the one in question have an equal voice and power in the management of all the affairs of the concern without regard to the amount of interest one may have in the capital of the concern, and no mere majority in interest can be recognized as having any power over those representing a minority in interest in the concern."

It is not necessary to follow the specifications in detail from fifth to twelfth, inclusive, wherein the learned judge undertakes to show that the defendants, and especially John Markle, acted in excess of their authority as partners, and must, therefore, account to plaintiffs for all expenditure of money not expressly authorized by all the partners. If such expenditure was wholly and palpably unauthorized, it may be that the decree could be sustained; but this brings us at once to the question what, under articles of copartnership such as these, and the nature of the partnership business, can be lawfully done by a majority of the partners, acting in good faith, in their best judgment, for the promotion of the partnership interests?

As we have already noticed, there are in fact at most but two of the partners here complaining, George B. Markle and Clora Markle; and at most, between them, they owned but a three and one-half sixteenths interest; twelve and one-half sixteenths belonged in different proportions to defendants. Alvan Markle, by withdrawing as plaintiff before the consideration of the evidence, and joining with defendants, ap-

proved and ratified all the acts of which he had previously complained in the bill.

The fact that E. P. Wilbur sold his interest to John Markle, yet afterwards continued to act as a partner, is not very material, for it did not change the majority in value or numbers. In his sale to Markle Mr. Wilbur stipulated that he should retain title to the interest until it was paid for. It was not paid for while he acted as a partner, under the terms of this sale. Wilbur, still holding a legal title, his vendee, John Markle, was the only proper party to object, and he did not do so. Therefore, in any view of the evidence, the management, good or bad, was expressly authorized or subsequently ratified by a very large majority of the partners in number and value. A very small minority—these two complainants—must now be treated as objecting. The court below, in its third conclusion of law, says: "A majority of the members * * * may do all those things necessary for successfully carrying on the business contemplated in the articles of copartnership;" but this correct enunciation of the law is neutralized by that part of his conclusion immediately following it, when he says: "But they have not the power to make permanent improvements, nor to establish a surplus fund for future improvements, nor to build a house, nor to employ clerks at excessive salaries, nor to employ an assistant superintendent, nor to do any other act not necessary for the ordinary business operations of the firm, without the consent of the minority members."

But who determines whether the particular act complained of is necessary for the successful carrying on of the copartnership? If, on a mere complaint and nonassent of the minority, there is no power in the majority, then the minority, in effect, carries on the partnership. If it is determined by the court on conflicting evidence, then the court carries it on. This is not the law. The rule laid down in Story, Partn. § 123, is stated thus:

"But another question may arise, and that is whether, in case of partnership, the majority is to govern in case of a diversity of opinion between the partners as to the partnership business and the conduct thereof, or whether one partner can, by his dissent, arrest the partnership business or suspend the ordinary powers and authority of the other partners in relation thereto, against the will of the majority, where there is no stipulation in the partnership articles to control or vary the result (for, if there be any stipulation, that ought to govern). The general rule would seem to be that each partner has an equal voice, however unequal the shares of the respective parties may be; and the majority, acting fairly and *bona fide*, have the right and authority to conduct the partnership business within the true scope thereof, and dispose of the partnership property, notwithstanding the dissent of the minority."

Then our own view of the law as stated by our late Brother Williams, in *Clarke v. Railroad Co.*, 136 Pa. 408, 20 Atl. 562, 10 L. R. A. 238, is as follows: "This leads us to consider the manner in which the business of a firm must be conducted. The firm must have its origin in the mutual confidence reposed by the persons who comprise it in each other's skill, integrity, and capacity. Its members are bound by the nature of their compact to the exercise of good faith towards each other and the common enterprise for which they have united. Differences of opinion about questions of administration are to be anticipated.

"It would be unreasonable to expect that all members of a partnership should see alike upon all questions, and for that reason a mere difference of opinion about the best thing to do, or the best way of doing it, does not necessarily work a dissolution, or send the business and assets of the firm to a receiver. It was the rule of the common law that the contracts of partnership must be governed, like other agreements, by the principles of natural law and justice. It has accord-

ingly been held that, where a firm consists of more than two persons, the majority, acting fairly and in good faith, may direct the conduct of its affairs as long as they keep within the purpose and scope of the partnership. 2 Bouv. Inst. § 1454; Story. Partn. § 123. In such case the minority must yield, so long as the majority do not transcend or pervert the powers with which the firm has been invested. If the number of partners should in any given case be an even number, and they should be evenly divided in opinion, with no provision for such a contingency in their articles, then it may be that, as to that subject, the power of the firm to act is suspended so long as the even division continues; and, if the subject be one upon which action is essential to the purposes of the partnership, such disagreement might work a dissolution by rendering the further prosecution of the common enterprise impossible. The same consequences could not flow, however, from the dissent of a minority, because, within the purpose of the partnership and for the promotion of its interests, the majority have the right to control."

John Markle was appointed superintendent or manager in the articles of copartnership at a salary of \$15,000, and continued till October, 1892, when the plaintiffs gave notice that they were dissatisfied with his management. He, from that time ceased to draw his salary, but continued in the management the same as before. He is an educated mining engineer, of large experience, and had the full confidence of his father, who for many years was a large coal operator in that region. During the five years 1890 to 1894, inclusive, the partnership made large profits,—over \$1,000,000. Of this, 40 per centum of the capital invested was paid out in dividends to the partners, and part of the balance was expended in improvements, and part set aside as a fund to meet contingencies, such as insurance, and depreciation in the value of machinery, and so forth. E. P. Wilbur had been in the coal business all his life, and was active as a consulting partner.

Gen. Lilly, while he lived, was active in consultation and advice, and two of his executors after his death.

These partners of large experience, joined by Mrs. Hessenbruch, and now also by Alvan Markle, owners of all but a small fraction of the capital, were of the opinion that the Jeddo tunnel should be constructed, because it was necessary if the business of the partnership was to be conducted at a profit. This business, by the terms of the articles was to continue 20 years. This tunnel, over a mile long, cost over \$200,000,—much more than the original estimate,—owing to impossible to be foreseen conditions in the strata penetrated. A dwelling house for the superintendent, costing \$16,000, was erected, on which John paid an annual rental equal to 6 per cent. of its cost. An assistant superintendent, at a salary of \$10,000, was employed. It is alleged that this last amount is excessive, and that defendants must account for and pay over the excess; that the setting aside of an insurance fund without consent of plaintiffs was illegal. And so, with other items of expenditure, the court directs that defendants shall account for all of them, and pay over to plaintiffs their share.

The fault we find with the learned judge's conclusion is that it does not follow the premise laid down by him. He concedes that a majority of the members of the firm had the power, if they acted *bona fide*, to do all those things necessary for successfully carrying on the business contemplated in the articles of copartnership. He does not intimate that they acted *mala fides*. Nevertheless, having acted in good faith, according to their honest judgment, as to the necessity of the expenditures, he imposes upon them the most severe penalty. He could not have made it more severe if he had found they had acted in bad faith, or had grossly and willfully mismanaged the partnership affairs. He acts on his own judgment as to how the property has been managed, and wholly disregards the judgment of the partnership. This, too, long

after the event when the exercise of fore-sight is no longer required. It is plain that the Jeddo tunnel cost more money than it would have cost if its projectors could have seen thousands of feet into the mountain through which it was dug before they determined its dimensions. But they planned it with the best skill and light they had. After proceeding a considerable distance, they found entirely different conditions from what they had been led to expect, and were compelled to greatly change their plans. This was a costly mistake, the consequence of a want of knowledge which no human power could have given them before the commencement of the work, but which certainly subjects them to no penalty for a mere ignorance which they could not dispel. And the same may be said of all their other acts complained of.

But, if they acted in good faith, yet lacked authority, either express or implied, in the articles of copartnership, the learned judge decides they must account. This interpretation of articles of copartnership to produce and market annually many thousands of tons of coal during a period running through many years, is entirely too narrow. It is the interpretation put by jurists upon the federal constitution,—“whatever power is not expressly granted is withheld.” But it was error to put that interpretation upon articles such as these, applicable to a business such as this. Rather the interpretation should be that whatever power is necessary to a profitable transaction of the business is impliedly given to the partnership, and, as the authorities cited show, the action in good faith of a majority of the partners is that of the partnership. The learned judge holds that the partnership had no authority to make a permanent improvement. But who should decide what is a permanent improvement? No doubt the Jeddo tunnel and other tunnels were permanent in that they would remain there after the termination of the partnership, and the superintendent’s house would also remain. They could not remove the tunnel or the house, and

use them elsewhere. But that is not the test to be applied to this partnership agreement. What was immediately necessary for the successful operation of the property? That must be constructed, even if it endured a century, and in the distant future might largely benefit others. Nearly all mine improvements constructed by those who first open the mines but do not exhaust them are more or less beneficial to their successors. Those who made them do not destroy them when their term ends. Therefore, in this sense, they are permanent. But they were constructed solely for the benefit of those who made them, because they to them were necessary during their temporary occupation of the land, but no longer. In this sense they were temporary, and it may be safely assumed would not have been made if those who expended their money on them had not deemed them immediately necessary for their profit. The manifest weight of the evidence sustains all of the material averments of the defendants in their answer as to the immediate necessity for these improvements and other expenditures. They are not bound to account further, because they have regularly and fully accounted, and paid the net earnings to the partners. Any funds in their hands, for which they, according to their answer, are held for distribution, and for which they have not yet accounted to the plaintiffs, should at once be paid over, accompanied by satisfactory accounts.

In effect, this reverses the decree of the court below. It is further ordered that the costs be paid by the appellees.

It is not improbable that Clara Markle has been misled to her hurt in this litigation. As is obvious from her testimony, her knowledge of the business is very limited, and her principal advisor is her brother George; but, as long as that relation continues, she must abide the consequences which flow from his guidance. As to John and George, they are intolerant of each other. John is a competent mining engineer and business man. His testimony shows that he is not ignor-

ant of his own merits. George has not been successful. His large estate—at least, a great part of it—has slipped away from him. He has become embittered against his associates, especially his brother John, and doubtless believes they have wronged him. His belief is founded on no facts warranting it. Perhaps if John, the manager, had shown towards him a little more gentleness, and had acted with a little more tact, all this prolonged and expensive litigation, which has now been before us in different shapes in not less than four appeals, might have been avoided. George, perhaps, might have been convinced, as was his brother Alvan, that his copartners were in good faith managing this large and profitable property for the best interests of all. But it is useless to now speculate. It is possible the partnership may be harmoniously conducted in the future. If not, then at the end of six months from filing this decree, under the clause of the agreement providing for the sale of an interest of any one of the partners to the others, the court below may have to interfere, if they cannot agree. Therefore, while we reverse the decree of the court below, we will not finally dismiss the bill, but leave it pending, so that equity may be done in this particular without disturbing the ordinary business operations of the partnership.

CRANES GULCH MINING CO. v. JOSEPH SCHERRER ET AL.

(134 California 350; 66 Pac. 487. Supreme Court. Oct. 11, 1901.)

Under the Placer Act of 1870 there was no reservation of known lodes and the entryman and patentee owned the entire premises without exception of lodes known or unknown.

¹After entry the right to patent is absolute and the government cannot impose further conditions. Where on May 10, 1872, entry of a placer had been made and the patent which followed excepted known lodes under a section of the act of that date the excepting clause was a condition which the land office could not impose and was void.

Department 2. Appeal from Superior Court, El Dorado County; N. P. BENNETT, Judge.

Proceedings by the Cranes Gulch Mining Company against Joseph Scherrer and others. From a judgment in plaintiff's favor, defendants appeal. Affirmed.

TABOR & TABOR, and JOHN M. FULWEILER, for appellants.

LINDLEY & EICKHOFF and WILLIAMS & WITMER for respondent.

TEMPLE, J. Action to quiet title to mining ground. Plaintiff claims under a patent for a placer mine dated July 1, 1872. The defendants claim under a lode location made in

¹*Last Chance Co. v. Tyler Co.* 61 Fed. 558. *Deffebach v. Hawke*, 115 U. S. 392. *Davis v. Weidbold*, 139 U. S. 527. *Migeon v. Montana Ry.* 18 M. R. 446.

Mere outcroppings are not sufficient to make a known lode. It must have value. An abandoned lode location is not a known lode. More proof is required than what would be sufficient in a contest between conflicting lode locations or with a subsequent placer location. *McConaghy v. Doyle*, 32 Colo. 92; 75 Pac. 419.

1897. Plaintiff's patent was based upon proceedings instituted May 9, 1871, and upon final entry and payment made February 14, 1872.

The rights of plaintiff had their inception under what is usually called the "Placer Act," dated July 9, 1870. This act, though not repealed, was amended by adding a reservation of known lodes, and in some other respects by the act of May 10, 1872, sometimes called the "General Mining Act." In section 10 it was enacted that the placer act should continue in force, except as to the proceedings to obtain a patent, which, it was provided, "shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims." It was further enacted in the same section that all placer claims thereafter located should conform to legal subdivisions of public land surveys, "provided that proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases."

Defendants claimed under a location made of a lode some 26 years after the issuance of the patent. It is contended that the lode was a known lode when the application for the patent was made in 1871. The patent contained the usual reservation found in all patents issued under the act of 1872 of veins or lodes known to exist at its date within the described premises. Defendants had no claim to the premises at the date of the passage of the act of 1872, or prior to 1897. It does not appear that there was any adverse claim to the placer location prior to that time.

Sections 6 and 7 contain rather elaborate provisions in regard to the application for a patent and for a contest. Section 11 provides for the case where a placer claim contains a lode within its boundaries. The placer claimant may purchase the lode if he chooses, but, if a lode is known to exist within the placer, "and application for a patent for such

placer claim, which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right to the vein or lode claim, but when the existence of a vein or a lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The first question of interest here is, does section 11 apply to plaintiff's location, and does it authorize the reservation contained in the patent? It may be conceded that, where no application for a patent had been made by a placer claimant, whose location and occupation were such that he could have inaugurated proceedings for a patent before the act of 1872 was passed, he would be compelled to proceed under section 11, and that the act made his patent subject to the conditions there expressed. Possibly this would be true as to applications pending when the last act was passed, provided payment had not been made, and a certificate issued; but to make it apply to a claim when a certificate of purchase has been issued, before the act of 1872 was passed, so as to include these reservations, would violate the provisions in section 16 of the act "that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

Upon payment of the price and its acceptance, the applicant becomes vested with a complete equitable title and entitled to a patent, which will convey to him the legal title. He is the real owner of the mine. His right is complete; only the evidence of his right is withheld. It has been held: "When the price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the office causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast additional burdens upon the purchaser, or expose him to the assaults of third parties."

Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 431, 12 Sup. Ct. 878, 36 L. Ed. 764. See, also, *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925, and *People v. Shearer*, 30 Cal. 645.

One of the contentions of appellants upon this point, if I rightly grasp it, is that lodes did not pass by a patent issued for a placer claim under the act of 1870. This is based largely upon the language of section 12, as numbered in the amendatory act: "Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz and other rock in place, shall be subject to patent and entry under this act," etc. And it is contended that it is to be construed as other sections of the act, of which it is made a part, had been construed. The act, it is contended, authorizes the sale to a lode claimant of one lode only. He gets no land save such as is required for the convenient working of his lode. If another lode or a placer were found within land taken by a lode claimant under the act of 1866, of which the act of 1870 was amendatory, the lode claimant would have no right to the other lode or to the placer. So here it is said the act of 1870 only authorized the sale of a placer claim. Without entering the land, or getting a patent, the claimant could hold and work out his mine; but to hold it he was required to comply with certain burdensome conditions. The patent, it is argued, merely gave him title to his claim, and relieved him from the burdensome conditions. He then owned his claim freed from the conditions and the liability to lose it by abandonment. But what he claimed was the right to mine that placer, and in terms the statute confines his patent to that. And this position is much strengthened by the rule of construction which requires all grants from the government to be construed favorably to the government and against the grantee.

Furthermore, it is said the same act provides for the purchase of a lode claim and land necessary for its working at

the price of \$5 per acre, and it is provided that no patent issue for more than one vein or lode, which shall be expressed in the patent issued. It is strongly urged that congress could not have intended, while so carefully providing that no one person should be permitted to purchase more than one lode, to permit in another section of the same statute any one to purchase a tract of land which may include many lodes at one-half the price per acre charged for lode claims.

All this is very plausible and persuasive, but the statute clearly authorizes the sale of placer lands in tracts not to exceed 160 acres, and that such tract shall conform to the system of public surveys. No provision is made for any reserved right in the government, or for the disposition of the land subject to the rights of the placer claimant. The lode claimant gets a complete title to the lands within his patent, subject only to the express reservation which the law directs should be contained in the patent. No reason appears why a placer patent shall not be construed in the same way, and the law has not expressed any limitation upon the estate, or authorized the officers of the land department to express in the patent any reservation. In the absence of a located lode within the limits of the placer claim, and of a contest, it would seem that the officers of the land department need only ascertain that there is a placer which may be entered as such.

The law of 1872 supplied an apparent defect in the law of 1866, as amended in 1870, by providing for a reservation of known lodes. This is calculated to protect the government, and to prevent the entry of lodes as placer, and thereby get lode claims for \$2.50 per acre.

The argument merely tends to show that the rights of the government were not sufficiently protected by the law of 1870, and the further provision made in 1872 in that matter seems to show that in the opinion of congress, without the express

reservation, full title to the land would pass under the patent.
The judgment is affirmed.

McFARLAND, J. and HENSHAW, J., concurred.

Hearing in bank denied.

PORTLAND GOLD MINING CO. v. ANTHONY FLAHERTY.

(111 Federal 312. Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

Two men ascend foul up-raise. The falling body of the upper man brings down the lower. Plaintiff, in an action to recover for an injury received in defendant's mine, alleged that, as he and another employé were climbing up the crossing stulls in an up-raise, the other man, who was above, was overcome by powder smoke, gas, and foul air, and fell, striking plaintiff, and causing him to fall and receive the injury complained of. The evidence showed that the up-raise was impregnated with foul air, the effect of which was to greatly weaken and debilitate any one inhaling it, and that this weakening and debility often came on very suddenly; that the other man was climbing ahead of plaintiff, and was an experienced miner, familiar with climbing stulls in up-raises; that something struck plaintiff, and caused him to fall; and that both men were found immediately after at the foot of the up-raise, one dead, and the other severely injured. *Held*, that it was a reasonable inference from such evidence that the injury resulted from the cause and in the manner alleged, which justified the submission of the question to the jury, and that such inference was sufficient to sustain a verdict so finding, rendered under proper instructions.

¹Sending employees into blind up-raise filled with gas. Contributory negligence. A mining company violated its duty in respect to providing its employés with a reasonably safe place in which to work, where, through its foreman, it directed employés to go into an up-raise known to be filled with gas and foul air, and is liable for an injury resulting from the effect of such foul air to a workman who was not guilty of contributory negligence.

¹*Contributory negligence.*

After notice of fellow servant's habitual negligence, co-employee remains at his own risk. *Acme M. Co. v. McIver*, 5 Colo. App. 267; 38 Pac. 596.

Fright from danger of gas explosion not necessarily contributory negligence. *Stoughton v. Manufacturer's Co.* 159 Pa. 64; 28 Atl. 227. See *McMillan Co. v. Black*, 89 Tenn. 118; 14 S. W. 479.

Where a miner passes along an incline traversed by "skip" whether his conduct in using such track as a passage, there being other ways though less convenient, leaves the question of contributory negligence to the jury. *Luke v. Wheat M. Co.* 71 Mich. 364; 39 N. W. 11.

Failure to use ventilator. Plaintiff, who was inexperienced in mining, was employed by defendant as a "trammer," to load and unload and wheel away dirt and rock in its mine. When he had been working in the mine three days, he was sent, with another workman, into an up-raise, known by the foreman to be filled with gas and foul air, to clear away dirt and rock. While climbing up, the other workman was overcome by the foul air, and fell, causing plaintiff to fall and receive severe injury. Plaintiff had been in the up-raise the day before, and knew that the air was bad, but also that there was a ventilating apparatus, which, when properly operated, clarified it so that it was not dangerous to work there. *Held*, that such facts shown by the evidence were sufficient to support a finding by a jury that plaintiff was not guilty of contributory negligence in obeying the orders of the foreman to go into the up-raise.

Harmless error in charge. A statement in the charge, in an action by a servant for a personal injury, that "it was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work," while technically inaccurate, because it failed to limit the requirement to a "reasonably" safe place, did not constitute prejudicial error, where it was so explained by the context that the jury could not have been misled, and especially where defendant practically admitted that the place where plaintiff received his injury was not reasonably safe, and denied having sent him there for that reason.

Waiver of error. Remarks of counsel. Counsel cannot necessitate a new trial by their own failure to interpose seasonable objection to remarks of adverse counsel; and where, on the first objection, the court excluded the objectionable remarks from the consideration of the jury, there was no reversible error.

Admission of evidence. Harmless error. It is harmless error to permit a question to be answered which calls for the conclusion of the witness, where the conclusion stated was conclusively established by other evidence introduced by the adverse party.

A statement by an employé, when he was hired, that he was a miner, will not impute to him knowledge of dangers in a mine arising from the gross negligence of the master, but only those of a mine conducted with ordinary care and prudence.

No recovery where miner voluntarily sits down in dangerous place. *Bunt v. Sierra Nevada Co.* 138 U. S. 483. *Colorado Co. v. Carpita*, 6 Colo. App. 248; 40 Pac. 248.

Surface employee knowing of defects in engine cannot recover for injuries from same. *Scott v. Darby Coal Co.* 90 Ia. 689; 57 N. W. 619.

Miner injured from habitual mismanagement of switches of which

In Error to the Circuit Court of the United States for the District of Colorado.

This action was instituted by Anthony Flaherty, the defendant in error, against the Portland Gold Mining Company, plaintiff in error, to recover damages for injuries alleged to have been sustained by him while engaged in its service. The particular charge is that the defendant directed plaintiff to go up a certain up-raise, called the Four Queens up-raise, rising from the fourth level of its mine, to clear off rock and dirt which had fallen upon the lagging and stulls, at a time when the up-raise, by reason of an accumulation of powder smoke, gas, and foul air, was not a reasonably safe place, or in a reasonably safe condition, for any one to work in. It is alleged that one Harrington, another employé of defendant company, was directed to accompany the plaintiff, and that Harrington made the ascent, climbing up the crossing stulls in the up-raise, a little in advance of plaintiff, and that, when they had reached a point about 100 feet above the level from which they started, Harrington, suddenly overcome by the powder smoke, gas, and foul air, fell, and in falling struck plaintiff, and caused him to fall to the bottom of the up-raise, and to be greatly injured. Two defenses are interposed: (1) a general denial; (2) contributory negligence. There was a verdict and judgment for plaintiff, from which defendant prosecuted a writ of error to this court.

mismanagement he knew, takes the risk. *Beckman v. Consolidation Co.* 90 Ia. 252; 57 N. W. 889.

Plaintiff crossing shaft under cage cannot recover. *Rush v. Coal Bluff Co.* 131 Ind. 135; 30 N. E. 904.

Consideration of status of laborer as to knowledge of danger when working under loose roof. *Linton Co. v. Persons*, 11 Ind. App. 264; 39 N. E. 214.

In case of sudden cave miner ordered to the rescue not guilty of contributory negligence. *Frank v. Bullion Beck Co.* 19 Utah 35; 56 Pac. 419.

Not contributory negligence for driver to climb on car while moving. *Cons. Coal Co. v. Bokamp*, 181 Ill. 9; 54 N. E. 567.

Miner held to contributory negligence for not taking proper steps upon alarm of fire. *Pugh v. Oregon Co.* 14 Wash. 331; 44 Pac. 547.

Standing on bar of bucket is not contributory negligence when the defendant was negligent in sending it down at all at that time. *Alaska Co. v. Keating*, 116 Fed. 561.

Defendant liable where negligence shown, unless danger such that a prudent man would discern the defect. *Tradewater Co. v. Johnson*, (Ky.) 72 S. W. 274.

JAMES L. BLAIR (JAMES A. SEDDON and ROBERT A. HOLLAND, JR., on the brief), for plaintiff in error.

R. S. MORRISON (SCOTT ASHTON, on the brief) for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The first assignment of error is that the trial court erred in not directing a verdict in favor of the defendant. Learned counsel for defendant contend that such direction should have been given for two reasons: (1) Because there is no evidence that any negligence on the part of the defendant caused the

Failure to notice that car was on a down grade is not necessarily contributory negligence. *Cons. Coal Co. v. Bruce* (Ill.), 37 N. E. 912.

Whether danger so imminent as to require servant to leave employ is a jury question. *Webster v. Monongahela Co.* 201 Pa. 278; 50 Atl. 964.

It is only where the danger is obvious that the employee assumes the risk by remaining. *Mangum v. Bullion Beck Co.* 15 Utah 534; 50 Pac. 834. *Hamilton v. Rich Hill Co.* 108 Mo. 364; 18 S. W. 977. *Bunker Hill Co. v. Oberder*, 79 Fed. 726. *Graham v. Newburg Co.* 38 W. Va. 273; 18 S. E. 584. *Riverton Co. v. Shepherd*, 207 Ill. 395; 69 N. E. 921. *Weston v. Lackawanna Co.* 105 Mo. App. 702; 78 S. W. 1044.

Where plaintiff is injured as the result of his own neglect of duty, or in disobedience of orders, he cannot recover. *Reese v. Biddle*, 112 Pa. 72; 3 Atl. 813. *Lendberg v. Brotherton Co.* 97 Mich. 443; 56 N. W. 846.

Servant may remain under master's promise to repair. *Belleville Co. v. Mooney*, 60 N. J. L. 323; 38 Atl. 835. *Homestake Co. v. Fullerton*, 69 Fed. 923. *Harvey v. Alturas Co.* 3 Ida. 510; 31 Pac. 819.

Defendant can not recover if injured in attempting to do something which was not his duty to do. *Hamrick v. Balfour Q. Co.* 132 N. C. 282; 43 S. E. 820.

If the danger is so obvious that a prudent man would refuse to

injury to plaintiff; (2) because plaintiff assumed all risk attending and doing the work required of him.

In support of the first proposition, it is earnestly contended that no evidence is found in the record tending to show either that Harrington was overcome by powder smoke, gas, or foul air, or that plaintiff was struck by the falling body of Harrington, and thereby precipitated to the bottom, in the particular way and manner charged in the complaint; that, on the other hand, the verdict was based solely upon an unwarrantable conjecture by the jury without any substantial evidence to support it. If such were the case, it may readily be conceded that the verdict cannot be sustained.

The trial court, after having directed the attention of the jury to the particular negligent acts alleged in the complaint, charged as follows:

"The plaintiff has based his case on that state of facts in his pleading, and he is held to prove those facts. If he was injured in

work, plaintiff is guilty of contributory negligence. *Roceta v. Black Diamond Co.* 121 Fed. 451.

Servant may remain in employ after shift boss promises to make designated repairs. *Highland Boy Co. v. Pouch*, 124 Fed. 149.

Miner knocking away prop and not replacing it held guilty of contributory negligence and that he could not recover for injuries from fall from the roof. *Dickason Co. v. Peach*, 32 Ind. App. 33; 69 N. E. 189.

Contributory negligence will not defeat recovery where defendant has willfully violated statute regulations. *Riverton Co. v. Shepherd*, 207 Ill. 395; 69 N. E. 921.

The burden of proving contributory negligence is on the defendant. *Nord v. Boston Co.* — Mont. —; 75 Pac. 681.

That there was a safer method of doing the work that the plaintiff was doing when the accident happened does not prevent recovery when he was doing such work under the direction of the engineer. *Bernard v. Pittsburg Co.*, — Mich. —; 100 N. W. 396.

Where a miner has had years of experience it is of itself knowledge of incident dangers. *Northern Co. v. Beacham*, 140 Ala. 222; 37 So. 227.

A servant does not assume the risk in carrying out a direct com-

any other way, if Harrington was not overcome by powder smoke, gas, or fell (when the plaintiff fell) from some other means, and in his fall carried the plaintiff down, the plaintiff cannot recover. If Harrington did not strike the plaintiff at all, and did not cause the plaintiff to fall, the plaintiff cannot recover. That would be permitting the plaintiff to recover on a case he had not made; that he had not warned the defendant to meet."

From the foregoing it appears that the issue was clearly presented to the jury, and its verdict is responsive, to the effect that Harrington was overcome by powder smoke, gas, or foul air, and that as a consequence he fell, and in his fall struck plaintiff, and precipitated him to the bottom of the up-raise.

Is there any substantial evidence to support these findings? We do not mean direct evidence of a participant in the unfortunate event, or of an eyewitness necessarily, but is there any substantial evidence of any kind? Fair and reasonable inferences, drawn from facts and circumstances established

mand of the master unless no reasonably prudent man would obey it. *Henrietta Co. v. Campbell*, 211 Ill. 216; 71 N. E. 863.

²*Explosions. Bad ventilation.*

Death from fire damp explosion: Lamp opened by inspector on statement of deceased that it was safe: Recovery disallowed. *Morgan v. Carbon H. Co.* 6 Wash. 577; 34 Pac. 152.

Degree of duty of defendant to protect against gas. "All appliances known to science and readily obtainable." *Western Co. v. Berberich*, 94 Fed. 329. *Graham v. Newburg Co.* 38 W. Va. 273; 18 S. E. 584.

Duty of coal operators as to ventilation. *Ozarecki v. Seattle Co.* 30 Wash. 288; 70 Pac. 750.

Coal dust explosion case; no judicial knowledge of tendency to explosion. *Cherokee Co. v. Wilson*, 47 Kan. 460; 28 Pac. 178.

Persons handling dynamite are held to a greater degree of care than persons using less dangerous explosives. *Lanza v. Le Grand Q. Co.* 124 Iowa 659; 100 N. W. 488.

Venue.

In actions for personal injuries the law of the place of the accident controls. *Johnson v. U. P. C. Co.* — Utah —; 76 Pac. 1089.

Action will not lie by administrator appointed in Colorado for

by the proof, are always competent evidence, and, indeed, in many cases of disputed fact, furnish the most satisfactory solution. The record now before us, in our opinion, presents just such a case. There is abundant evidence that the up-raise in question was on June 8, 1899, when plaintiff was injured, impregnated with foul air, that its effect was to greatly weaken and debilitate any one inhaling it, and that this weakening and debility often came on very suddenly. In fact, the defendant's own witnesses satisfactorily prove that the air in the up-raise was so impure and deleterious that two men had been overcome by it on the morning of June 8th, just before plaintiff made the ascent; that they became sick and unable to work longer; and that defendant company then concluded to do no more work on the up-raise until a certain drift could be completed so as to introduce air into it. On the question whether Harrington fell as a result of the impure air, as charged in plaintiff's complaint, the jury had before it the foregoing facts, well established by satisfactory

damage for negligent killing of deceased in another state. *Sanbo v. U. P. C. Co.* 130 Fed. 52.

Risks of the trade.

An employee, though under age, assumes obvious dangers of the trade. *Carter v. Baldwin*, 107 Mo. App. 217; 81 S. W. 204.

The question of assumed risk is for the jury and for the Court only where the evidence is all one way and the danger glaring. *Id.*

Whether the quarryman assumed the risk in removing tamping from unexploded drill hole is a question of fact for the jury, where the foreman assured the quarryman that there was no danger, but the quarryman, an experienced man, had equal means of knowledge of his own. *McKane v. Marr*, — Vt. —; 58 Atl. 721.

Duty of Master.

Not the duty of master to warn as to dangers that the servant is fully aware of, even if inexperienced. *Kansas Co. v. Chandler*, 71 Ark. 518; 77 S. W. 912.

In removing pillars the servant takes the risk at the point of removal, but it remains the master's duty to safeguard the approaches. *E. Jellico Co. v. Golden*, 25 Ky. L. R. 2056; 79 S. W. 291.

The master must know that place where servant is placed at work is reasonably safe except where the unsafe condition is recent and

evidence. The jury also had before it the undisputed fact that Harrington was an old and experienced miner, and probably so familiar with climbing up the stulls of up-raises as to be reasonably sure-footed and secure. From these facts the inference is not only permissible, but, in our opinion, altogether reasonable, that Harrington fell as a direct result of the weakening effect of the very bad and impure air of the up-raise. The jury was therefore fully warranted in finding, in response to the issue submitted to it by the court, that Harrington's fall was occasioned by the impure air in the up-raise, as alleged in the complaint.

We are also of opinion that the record shows sufficient evidence from which the jury could reasonably infer that plaintiff was struck by the falling body of Harrington, and thereby precipitated to the bottom. The undisputed facts disclosed in the proof on this point are that Harrington, in making the ascent, was necessarily immediately above the plaintiff, and five or six feet only in advance of him; that Harrington

there has been no time to repair. *Kentucky Co. v. McGee*, 25 Ky. L. R. 2211; 80 S. W. 1113.

The master can not delegate the performance of duties to his servant to provide a safe place to work and so escape responsibility. *Bunker Hill Co. v. Jones*, 130 Fed. 813.

Neglect of Statutory Regulations.

Construction of Illinois statute requiring door keepers at certain passages in coal mines. *Himrod Co. v. Stevens*, 203 Ill. 115; 67 N. E. 389.

Contributory negligence held no defence to accident caused by master's wilful neglect of statutory duties. *Chicago C. Co. v. Fidelity Co.* 130 Fed. 957. *Fulton v. Wilmington M. Co.* 133 Fed. 193.

Defenses.

Where a certain rope was necessary to the miners' safety, which was removed by a fellow servant, plaintiff has no cause of action. *Bunker Hill Co. v. Kettleson*, 121 Fed. 529.

Owner not liable for accident under contractor, from contractor's neglect. *Central Co. v. Grider*, — Ky. —; 74 S. W. 1058.

Employer not liable where the miner used a rope and bucket when he should have used ladder. *Gribben v. Yellow Aster Co.* 142 Cal. 248; 75 Pac. 839.

fell; that something struck plaintiff; and that the two men were found immediately thereafter at the bottom of the up-raise, Harrington dead, and plaintiff severely injured.

A fair inference to be drawn from these facts, in the absence of any evidence showing any other cause for plaintiff's fall, is that he was struck by Harrington's body, and thereby caused to fall to the bottom of the up-raise. We cannot agree with counsel for defendant that there is any ground for a reasonable inference that Harrington fell as a result of insecure footing or slipping on the stulls, or that plaintiff's fall was occasioned by the dropping of rock upon him. It would certainly be altogether conjectural to say that Harrington fell either as a result of slipping or insecure footing, or that some stone fell and hit the plaintiff, and caused him to drop to the bottom of the up-raise. There is no evidence tending to show that Harrington slipped, or that any stone fell, and

Pleading, Proof, Presumptions, Practice.

A cave-in is not presumptive proof of negligence. *Mountain C. Co. v. Van Buren*, 123 Fed. 61.

It is error to predicate an instruction upon the want of knowledge of plaintiff without the qualification that by the use of ordinary care he could have acquired knowledge. *Breedon v. Big Circle M. Co.* 103 Mo. App. 176; 76 S. W. 731.

What is ordinary care by a miner against danger from a cave-in of the stopes is a question of fact for the jury. *Hone v. Mammoth Co.* 27 Utah 168; 75 Pac. 381.

Slight variance in proof of details of the accident will not defeat recovery. *Nord v. Boston Co.* — Mont. —; 75 Pac. 681.

Evidence of the general usage where inexperienced miners are working along with older men, held admissible. Although the word "custom" was used with reference to such testimony, it was only admitted to show the precautions usually taken and need not have the age of the common law custom. *Pence v. California Co.* 27 Utah 378; 75 Pac. 934.

A count for negligence at common law may be joined with count under the mines regulations acts. *Marquette Co. v. Dietie*, 208 Ill. 116; 70 N. E. 17.

Where a minor employed as a mere laborer, is put to work on machinery in a dangerous place he will not be presumed to have

therefore no ground to warrant an inference that plaintiff was injured thereby; whereas, there are facts, fully established in evidence, that justify the inference that plaintiff fell as charged in the complaint.

The evidence, as already pointed out, substantially shows that the defendant did not provide a reasonably safe place for its servants to work in. Indeed, this is practically conceded. The stress of the defense is that the mining company did not direct plaintiff and Harrington to go into the up-raise to clear off the rock and dirt at all, but did direct them to go to the bottom of the up-raise, and take up and wheel away a large quantity of dirt, which in the progress of the recent drilling above had fallen and collected there. Ray, the foreman, gave the directions in the presence and hearing of De

knowledge of all the dangers which a mature man would perceive. *Merrifield v. Maryland Co.* 143 Cal. 54; 76 Pac. 710.

A plaintiff is not bound to show by demonstration that the alleged defect was the cause of the accident. He is only required to introduce sufficient proof, direct or circumstantial, to make a case for the jury. *Cecil v. American Co.* 129 Fed. 542.

A plea of assumption of risk is not essential where the facts from which the assumption is implied, appear from plaintiff's own case. *Iowa Co. v. Diefenthaler*, 32 Colo. 391; 76 Pac. 981.

Where unsafe condition of roof is alleged it is not essential to add that defendant knew it was unsafe. Proof held sufficient of roof left negligently unsafe. *Wilson v. Alpine Co.* — Ky. —; 81 S. W. 278.

Question whether premises were sufficiently lighted is for the jury and opinion evidence is not admissible. *Meyers v. Highland Boy Co.* — Utah —; 77 Pac. 347.

It is error to disallow the plaintiff to prove a description of the place where the injury occurred and how it could have been prevented. Evidence held enough to go to the jury in scale case. *McFarland v. Harbison*, — Ky. —; 82 S. W. 430.

An inexperienced miner has the right to presume that the timbering is safe. Instructions reviewed in a case based on defective timbering. *Mountain Cop. Co. v. Van Buren*, 133 Fed. 1.

The question of negligence is for the jury except where on conceded facts all reasonable minds must draw the same conclusions. *Collingwood v. Illinois Co.* — Iowa —; 101 N. W. 283.

Camp, the superintendent of the company. Both his and De Camp's version is that the men were directed to go to the foot of the up-raise, and take up and wheel away the dirt, and were cautioned under no circumstances to go aloft, because of the presence of bad air in the up-raise.

The fact fully recognized by them, that the up-raise was filled with bad air, was a reason assigned by them for confining the work to be done by plaintiff and Harrington to wheeling away the dirt from the bottom. Plaintiff and several other witnesses testified positively that the foreman directed plaintiff and Harrington to go up the up-raise, and clean off the stulls and lagging, from the top to the bottom. The jury, under proper instructions, found this controverted issue in favor of the plaintiff. We are bound, therefore, to conclude from defendant's own evidence, not only that the place into which plaintiff was sent to work was a dangerous and unsafe place, but that defendant well knew it to be so, and we are bound to conclude from the verdict that the defendant ordered the plaintiff to do work in this dangerous place. It follows that in doing so the defendant did a wrongful and negligent act.

It is next contended that the court erred in not directing a verdict for defendant because the evidence conclusively shows that plaintiff well knew the dangerous condition of the up-raise, voluntarily entered upon the work there, and cannot recover for any injury sustained by him. We cannot agree to this proposition. It is undoubtedly true, and so axiomatic that it needs no citation of authorities to support it, that when a servant of mature understanding voluntarily and knowingly conforms to the directions of his master to perform work in a place rendered dangerous by the negligence of the master, and when the servant is fully aware of all the facts and circumstances constituting the danger occasioned by the negligence of the master, he himself is guilty of negligence contributing to any injury he may sustain while engaged in

such work, and cannot recover from the master for such injury.

A brief reference to the admitted facts of the case, in our opinion, fails to bring the plaintiff within the principle just announced. The record shows that he was a man inexperienced in mining. The manner of giving his testimony indicates that he was an ignorant man. He was hired by the defendant only three days before the injury, and was hired, as Superintendent De Camp admits, to do the work of tramping; that is, simply to load and unload dirt and rock and wheel them away. This is the humblest kind of labor. He had never worked in a mine before. There is no evidence that he had any knowledge of underground mining operations, or any familiarity whatever with the properties or laws governing the action and effect of powder smoke, gas, or bad air, or any familiarity with the necessity for or manner of ventilating the mines. On the contrary, his inexperience and humble employment would tend to prove the contrary. It is true the evidence discloses that plaintiff on the day before his injury went up the up-raise to help Ferrens, another employé, to set up a machine for drilling purposes, and that he then noticed bad air, but he says: "It come all right after Ferrens [who was familiar with handling the machine and with the operation of compressed air] turned the air holes loose." It is also true that plaintiff testified that, when he and Harrington got to the fourth level at the bottom of the up-raise, they sat around a little while, and that Harrington went up part way, and returned, saying: "It seemed a mean place to work up there; * * * that the air seemed bad." The evidence shows that they then waited about 15 or 20 minutes before undertaking to make the ascent, "to see," as plaintiff says, "if the place would clear up." Plaintiff testified that, as he was making the ascent, the air did not seem quite as bad as it was the day before. This, and evidence like this, is all the defendant relies upon to conclusively establish plain-

tiff's contributory negligence. The evidence shows that the mine was fully equipped with a circulatory system, consisting of a compressor at the top, with connecting air pipes going down to the lower levels of the mine, and back around to the fourth level, to reach the Four Queens up-raise, and that it extended to the top of that up-raise, with adjustable openings near the top and bottom, so as, when properly operated, to force the foul air down and clarify the up-raise. This was operated by a man in charge of the compressor at the top, and subject to the control of an experienced miner, and possibly others who might be familiar with its mechanism and operation in the Four Queens up-raise. Plaintiff, knowing, at least, as he says, that the proper operation of the air holes would clarify the up-raise, might reasonably expect that the men in control would do their duty, and operate the system so as to clarify the up-raise into which he had been ordered to work. He waited 15 or 20 minutes, expecting, doubtless, that the men in control would discharge their obvious duty.

In the light of these facts and others hereinbefore pointed out, we cannot say that the record conclusively shows that plaintiff had such knowledge of the facts and circumstances constituting danger and of the danger itself as to make him guilty of contributory negligence in entering upon the work as directed by the defendant. It is, in our opinion, an extremely conservative view to say that the facts and circumstances of the case render his knowledge of the danger uncertain and debatable. The issue was for the jury, and, after full and clear instruction by the court, it found against the defendant on the same. There being substantial evidence to support this finding, we cannot interfere with it.

Defendant next complains of the following portion of the court's charge to the jury, namely: "It was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, so as not unreasonably to expose him to unnecessary danger in the doing of his work." Counsel con-

tend that the court should have qualified the word "safe" as here employed by the adverb "reasonably," and, not having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of the case?

The court told the jury that the obligation resting on defendant was "to use ordinary care" to furnish a safe place so as not "unreasonably" to expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediately following context, namely: "This duty to use ordinary care, generally, is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances." The charge, as a whole, on this point was, in our opinion, substantially correct.

Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the up-raise; for the very reason that it was so filled with bad air as to be dangerous.

Defendant next contends that the verdict should be set aside and the cause remanded for another trial because of alleged misconduct of plaintiff's counsel in his closing argument in commenting upon the practice of taking affidavits of witnesses before the trial, and their influence upon the witnesses' testimony at the trial. Mr. Sausman, a witness for defendant, testified on cross-examination that he had made

an affidavit with reference to the accident in question, and that the man who took his affidavit was in the employ of a guaranty and accident insurance company. In his closing argument counsel for plaintiff said:

"So soon as an accident happens, the man is turned over to the insurance department, and the way they do is this: They call up the men, every one that knows anything about it, and take affidavits not only before their attorneys, but before the attorney of the insurance company, which steps into the shoes of the mining company. These affidavits are kept in store, and when you have a case ready for trial they turn to their witnesses, and are able to read them all those portions that are favorable, and can keep quiet all those portions that are not favorable; * * * and so this man, when this accident is referred to, has a mere reminiscence. All his life he pays for it, and we say the insurance company in this case should pay for that."

Counsel for defendant, so far as we can see from the record, waited until the close of the argument, when he said:

"I submit there is no evidence of insurance in this case. I object and except to this all through this argument. I except to all these references counsel has been making in his argument, with reference to insurance and insurance men, because there is no evidence in the case, and it has been expressly overruled, under objection, by the court."

Counsel for plaintiff responded:

"It has come out in the evidence that the affidavits to which I refer were taken before the agents of this insurance company."

Thereupon the court said:

"I do not care to hear arguments on that. I will exclude it from the jury. The argument is improper, even if the subject inadvertently came out in the evidence."

It may be conceded that this argument of counsel was improper, because it was not based upon any substantial evi-

dence material to the cause; but what is to be done? Counsel for defendant, instead of seasonably interposing their objection, allowed the remarks to be made, and after the conclusion of the argument, as already seen, objected, and excepted to all the references which had been made to the subject throughout the lengthy argument. Counsel cannot necessitate a new trial by their own failure to interpose seasonable objections to remarks of adverse counsel. Argument in all cases should be confined to a legitimate discussion of the issues in the case on the evidence before the court, and it is the duty of the trial court in all cases, upon suggestion of unwarrantable departure, to immediately confine counsel to legitimate argument. In our opinion, this was done in the present case. The court acted, according to the record, immediately upon the first suggestion of counsel, and excluded from the jury any consideration of the argument objected to. There is no merit in this assignment of error.

There are two assignments of error challenging the correctness of the court's action in the admission of evidence offered by plaintiff. One was in permitting Ferrens, a witness called by plaintiff, and who had shown himself to be an experienced miner, to answer the following question: "Q. Was that dangerous employment [referring to the particular service required of plaintiff] for an inexperienced man on any account arising from foul air?" Defendant's counsel objected to this question because it was immaterial, irrelevant, and incompetent, and calls for a conclusion of the witness. The only one of these grounds of objection to which we can give any consideration is that the question calls for a conclusion. The other reasons assigned are so general as, under the established practice of this court, they cannot be considered.

It may be conceded that the question as put was technically improper, in that it called for a conclusion of the witness; but there was no prejudicial error in permitting the question

to be asked, because the evidence for the defendant taken thereafter conclusively established that the service which plaintiff testified, and which the jury found, was required of him, was dangerous for any man, experienced or inexperienced. The other testimony alleged to have been objectionable, and to which exception was saved, consists of permitting witness Ray, called by the defendant, to answer the following cross-question put to him by plaintiff's counsel: "Q. How did it come that Flaherty was thrown down below the bulkhead, if rock would not come down?" It is sufficient to say concerning this that the connection in which the question appears renders it proper as a legitimate cross-examination of the witness.

It is next urged that the court erred in refusing to give certain specific instructions asked by the defendant. One was to the effect that if Flaherty, at the time of seeking employment stated to the superintendent that he was a miner, "then he guaranteed to the defendant that he was a miner, understood the business, and knew all the ordinary risks and dangers incident to the employment which he sought, and also all the dangers arising from the presence of gas, foul air, and powder smoke." There was no error in refusing this instruction, because it satisfactorily appears from the superintendent's own testimony that Flaherty was hired to wheel and tram, and not to do the work of a general miner. According to the superintendent's own testimony, he knew that the work which Flaherty had formerly done (as detailed to him by plaintiff) was not mining. Moreover, the latter part of the instruction asked and refused contained an incorrect proposition of law. All that plaintiff could have guaranteed by implication from the statement alleged to have been made by him that he was a miner was that he was familiar with all the usual dangers arising from the presence of such impurities in mines when conducted with ordinary care and prudence. The instruction requested was too broad. It imputed

knowledge to plaintiff of all possible dangers, even those that might arise from gross negligence on the part of the owner. In the light of the undisputed facts, there was no error in refusing to give this instruction. The refusal by the trial court to give several other instructions requested by defendant is assigned for error, but we have not been favored in argument or brief with any particular discussion of them. This is probably because the principles involved in them were thoroughly argued by counsel on treating the propositions already fully considered. We have, however, carefully considered each and all of the instructions so refused, and find that in so far as they embody correct propositions of law applicable to the facts of the case, they were fully covered by the general charge of the court. There was therefore no error in refusing to give them as requested.

We are unanimously of opinion that the verdict was for the right party, and that there is no substantial error found in the record of which the defendant can justly complain. The judgment must be affirmed.

ERNEST THALLMANN ET AL. V. T. E. THOMAS.

(111 Federal 277. Circuit Court of Appeals. Eighth Circuit. Oct. 14, 1901.)

An employe ascertaining that his employer has mined beyond his lines into vacant ground is not precluded by the way he got his knowledge from locating a claim which will cover such workings.

¹Trespass on rightful possession. A valid location of public land cannot be instituted while another has the possession and right of possession under an earlier lawful location.

No location by forcible entry. A valid claim to public land cannot be initiated by forcible entry upon it, even while it is in the possession of one who has no right to the possession, and no lawful claim to secure the title.

Entry upon possession without title. Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry and location thereof while it is in the possession of those who have no superior right to acquire the title or to retain the possession.

Mistake in patent. Proof beyond reasonable controversy. Patents, contracts, and conveyances, the accredited evidences of rights and titles, may not be set aside or modified for mistakes unless those mistakes are established by evidence that is plain and convincing beyond reasonable controversy.

Decree of lower court presumptively correct. Where a chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be deemed to be presumptively correct in an appellate court; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed.

¹*Locations initiated by trespass.* Location cannot be initiated on government land by forcible, fraudulent or clandestine entry. *Nevada Co. v. Home Co.* 20 M. R. 283.

A party may not enter upon the workings of a claim to initiate a title in himself. (In this case the party had taken possession of an old and largely developed mine). *Phenix Co. v. Lawrence*, 12 M. R. 261.

A party entering within the lines of a defined claim actually being worked is a trespasser and cannot initiate a title by such trespass. *North Noonday Co. v. Orient Co.* 9 M. R. 524. *Weese v. Barker*, 7 Colo. 178; 2 Pac. 919.

Appeal from the Circuit Court of the United States for the District of Colorado.

The Nellie lode mining claim, situated in the state of Colorado, is owned by the complainants, Ernest Thallmann and Hamilton F. Kean. It extends in a westerly direction from its eastern boundary up the side of a precipitous mountain, which has in some places a slope of 35°, for a distance of 1,368 feet, and its width is 300 feet. It was patented on July 18, 1890, and in the summer of 1898 the complainants were taking ore from it, and had driven some of their tunnels across its north line into adjoining territory that was a part of the unappropriated public domain. Their workings were many feet below the surface of the land, and they had never taken possession of this land above these underground workings. On June 28, 1898, the defendant, T. E. Thomas, peaceably entered upon and located the Thomas lode mining claim upon land adjoining the Nellie claim upon the north. The patent to the claim of the complainants described its north side line as extending from its northwest corner, which is corner No. 1 of the description, N., 76° and 5' E., 1,368 feet, to corner No. 2, and it describes its south side line, which is parallel to the north line, as extending from corner No. 3 "S., 76° and 5 minutes W., 1,368 feet, to corner No. 4." The complainants alleged that there was a mistake in the description of these courses; that they should have read, respectively, N., 77° and 54' E., and S., 77° and 54' W.; and they prayed for a correction of the mistake,

"As between two locators and as affecting their rights only, one cannot locate ground of which the other is in actual possession under claim or color of right because such ground would not be vacant or unoccupied." *Eilers v. Boatman*, 3 Utah 159; 2 Pac. 66.

The senior discoverer in possession cannot be ousted from the ground actually held by him. *Fazon v. Barnard*, 9 M. R. 516.

Before the Act of May 10, 1872, possession of itself made good title and a location could not be made over the actual possession of a first claimant. *Rush v. French*, (Ariz.) 25 Pac. 816, 831.

A party cannot initiate a title by entering on the ground within the 60 days allowed discoverer to sink his shaft. *Craig v. Thompson*, 10 Colo. 528; 16 Pac. 24.

The discoverer having 60 days to perfect location is not deprived of his rights by a party who within that time prevents performance by taking possession of his work. *Erhardt v. Boaro*, 4 M. R. 432.

In *Clipper Co. v. EM Co.* 29 Colo. 377; 68 Pac. 286; it is held that the location of a lode claim within the lines of a placer is a loca-

and for an injunction against the defendant from obtaining a patent to the land which would fall within the corrected description. The northeast corner of the description in the patent is indisputably located where it was placed at the time of the original survey, while the monuments which mark the westerly corners are gone, and their original locations are in dispute. The result is that the effect of correcting the description in the patent in the manner sought by the complainants would be to swing the west end of the Nellie claim in a northeasterly direction 43 feet, and to embrace within it a triangular tract of land north of the tract described in the patent 43 feet in width at its westerly end, diminishing to a point at its easterly end. A portion of this triangle which is within the Thomas claim is the land here in controversy. It comprises only about half an acre, but within this half acre it is claimed that the apex of a valuable lode of mineral crops out, and this is the real cause of the contest. The defendant denies that there was any mistake in the patent of the Nellie claim, and the circuit court rendered a decree in his favor, 102 Fed. 935.

CHARLES J. HUGHES, JR. (GERALD HUGHES, on the brief),
for appellants.

CHARLES S. THOMAS (WM. H. BRYANT and HARRY H.
LEE, on the brief), for appellee.

tion initiated by trespass and therefore void. Affirmed 194 U. S. 220.

In *Omar v. Soper*, 15 M. R. 496, the location first completed, was held to be a title initiated by trespass, because it had made its discovery before the expiration of the time of the first discoverer to complete his location although its discovery was outside the limits of the feet claimed by the first discoverer. This case seems to be isolated and irreconcilable with any of the other cases except those which treat possession alone as a thing inviolable and discard entirely the prescription of the Mining Acts.

The right to the possession comes only from a valid location. If there is no location there can be no possession under it. *Belk v. Meagher*, 1. M. R. 534. *Sweet v. Webber*, 7 Colo. 443; 4 Pac. 752. *Lalande v. McDonald*, 2 Ida. 307; 13 Pac. 349. *Garfield Co. v. Hammer*, 6 Mont. 53; 8 Pac. 153. *McKinstry v. Clark*, 4 Mont. 395; 1 Pac. 759.

Mining ground cannot be held by possession alone against a valid location. *Noyes v. Black*, 4 Mont. 527; 2 Pac. 769. *Hauswirth v. Butcher*, 4 Mont. 299; 1 Pac. 714.

A party who goes upon mineral lands and relies upon his posses-

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first objection which counsel for the complainants urge to the decree below is that the defendant knew that the complainants were in possession of the half acre here in controversy when he made his entry upon it, and that in consequence of this possession and knowledge his location is void. This proposition rests upon the fact that Thomas worked in the mine of complainants for a few weeks in the winter preceding his entry in June, 1898, and that he probably suspected, if he did not know, that they had run their tunnels through and taken some ore from this tract of land north of the line of their patented claim. They had, however, never occupied the surface of this land. It appeared from their patent to be without the limits of their claim. That claim had been definitely located in 1881. It had been patented in 1890. The complainants had given no notice, brought no

sion alone cannot defend against a later party who is the first to complete his location after which event the first party is the transgressor. *Horswell v. Ruiz*, 15 M. R. 488.

Possession is good against mere intruders but not against a party who has complied with the mining laws. *Garthe v. Hart*, 15 M. R. 492.

Entry on the claim to relocate for non-performance of annual labor is not a trespass although the original owner is in possession—the court refusing to follow *Eilers v. Boatman* and *Weese v. Barker*, *supra*. *Du Prat v. James*, 15 M. R. 341.

It is the first who complies with the law, not the first discoverer, who is to be protected. *Gleeson v. Martin White Co.* 9 M. R. 429.

The first in time to complete his location, the first upon the ground not completing within a reasonable time, is the first in law. *Gregory v. Pershbaker*, 15 M. R. 602.

If the first discoverer fails to make a valid location another may locate the same vein. *Willeford v. Bell*, (Cal.) 49 Pac. 6. *Hayes v. Lavagnino*, 17 Utah 185; 53 Pac. 1029.

suit, made no motion to change its location, and the defendant made his entry and claim peaceably and without objection from any one. There was nothing in this state of facts to prevent him from initiating a perfect right to this land. A valid claim to unappropriated public land cannot be instituted while it is in possession of another who has the right to its possession under an earlier lawful location. *Risch v. Wiseman* (Or.), 59 Pac. 1111; *Seymour v. Fisher*, 16 Colo. 188, 27 Pac. 240. Nor can such a claim be initiated by forcible or fraudulent entry upon land in possession of one who has no right either to the possession or to the title. *Atherton v. Fowler*, 96 U. S. 513, 516, 24 L. Ed. 732; *Trenouth v. San Francisco*, 100 U. S. 251, 256, 25 L. Ed. 626. But every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.), 98 Fed. 673, 680. Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry of it under the acts of congress by a competent locator. There was nothing in the possession of the lode in this land by the complainants many feet below its surface, and their wrongful removal of ore from it, nor in the defendant's suspicion or knowledge of this trespass, nor in the fact, if it be a fact, that he learned of the trespass through his employment as a miner and shift boss of the complainants, to prevent him from making an honest and valid location of a mining claim upon this unappropriated portion of the public domain in accordance with the provisions of the acts of congress which offered him this privilege.

There is but one other complaint of this decree, and that is that the court below should have found and corrected the

alleged mistake in the patent. The determination of the question which this objection raises has involved the careful perusal, digest, and analysis of more than 400 printed pages of conflicting evidence. It is useless to do more here than to briefly state what is conceived to be the effect of the proofs, and the reasons which have led to the conclusion that has been reached. The real issue in the case is whether corner No. 1, the northwest corner of the description in the patent, was where that description locates it, or at a point about 43 feet northeast of its location by the patent, and this issue arises in this way: The true location of corner No. 2, the northeast corner, is known. If, therefore, one starts from that corner, reverses the first course, and runs S., 76° and $5'$ W., 1,368 feet, he must come to corner No. 1, according to the description in the patent. There is no call in this description which is inconsistent with this location, and in the absence of other evidence the point thus found must be held to be the true position of this corner. The patent discloses the fact, however, that the original post set at corner No. 1 bore the marks 1+1902 on one side, and 1+1901 on the opposite side; and these marks indicate that this post marked the first corner of the survey or description of the Ella lode mining claim, as well as the first corner of the Nellie claim. The Ella claim adjoined the Nellie on the west, and corners 1 and 6 of this claim were identical with corners 1 and 4 of the Nellie. In the patent to the Ella which was issued on July 18, 1890, the statement is found that "an open cut at discovery bears south, 6 degrees and 52 minutes west, 180.7 feet distant" from the post at corner No. 1. This discovery cut is found, and its identity and location are undisputed. If one starts from this cut, reverses this course, and runs N., 6° and $52'$ E., 180.7 feet, he reaches a point about 43 feet northeasterly of the position of corner No. 1, according to the patent of the Nellie. Thus the question becomes whether the location of corner No. 1 of the

Nellie shall be determined by the course and distance from corner No. 2, described in the patent of that claim, or from the course and distance from the discovery cut of the Ella found in the patent of the latter claim.

Counsel for complainants invoke the conceded rules that the most certain and reliable calls prevail over the more uncertain and unreliable, the shorter distances over the longer, the more permanent monuments over the more temporary, and the established marks of the boundaries over their courses and distances; and then they contend that there must have been a mistake in the first and third courses in the patent of the Nellie, because it is more probable that a mistake would creep into these courses than that it would occur in the short course and distance from the discovery cut of the Ella to corner No. 1. In support of their contention they produced at the hearing the engineers who surveyed the Nellie and the Ella for location in 1881 and for patent in 1883, and these surveyors testified that the proper way to locate corner No. 1 was to follow the course and distance from the discovery cut found in the patent to the Ella; that they believed that the place found in this way was the original corner; that by starting from this point and following the courses and distances in the patent of the Ella, they found a stake and stones about 9 feet north of angle 2 of that claim, and another at angle 5 thereof; that the two first ties of corner No. 1 named in the patent to the Ella locate that corner 23 feet south of the position pointed out by the tie to the discovery cut; that in their opinion there is a mistake in the courses of the side lines named in the patent of the Nellie; and that this mistake was made in calculating out the length and direction of the center line of the claim which was originally found by means of a traverse. They testify that the courses and distances in dispute and the courses and distances of the ties of corner No. 1 which appear in the patents of the Nellie and of the Ella, including that to the discovery cut of the latter, were found

either by means of traverses or by triangulation and the necessary calculations, and that none of them were run upon the ground when the original surveys were made. The evidence of these witnesses was supported by the testimony of several surveyors to the effect that in their opinion the tie to the discovery cut of the Ella ought to prevail in locating corner No. 1 over the other indicia in the notes of the surveys and in the patents, because this call contained the course and distance from corner No. 1 to the nearest and the most permanent monument. On the other hand, the courses and distances that are alleged to contain the mistake were found by the original surveyors who now attack them, and were declared to be the true course of the Nellie vein in 1881, when they first surveyed the claim for that lode for location, and again in 1883, when they surveyed the claim for patent. The chief purpose of the survey for location was to determine the direction of this vein. If that direction was not correctly determined, it might run without the side lines of the claim, and be lost to the locator. They found and declared its direction to be, and it was described in the amended location certificate of September 26, 1881, based upon their survey, to be, "333.5 feet, running N., 76 degrees 5 minutes east, from center of discovery shaft, and 1,033.5 feet, running south, 76 degrees 5 minutes west, from center of discovery shaft." In 1883 they surveyed and laid the side lines of this claim parallel to the line which they had ascribed to the vein, and gave them the same course. In the latter survey they described two tunnels among the improvements upon the Nellie, and gave their bearings and distances from corner No. 1 of their survey of that claim. These tunnels are still there, and the approximate location of their mouths in 1883 is still discernable. Three surveyors testified that the lines described by the courses and distances which the original surveyors gave these tunnels from corner No. 1 as located by the patent of the Nellie strike within about 5 feet of the original mouths of

these tunnels, while, if they are run from the point where the complainants seek to locate this corner, they will strike from 40 to 100 feet further up a cliff, where there is no vein of mineral, and where there never were any tunnels. On October 4, 1887, one of the original surveyors of the Nellie made a survey of and tied corner No. 1 of the Golden Cross lode mining claim to corner No. 1 of the Nellie claim at the place where it is located by the patent, and not at the place where he now claims it was established. In 1892 the Kokomo No. 2 lode claim, and in 1896 the Star Gazer lode mining claim, were surveyed by other engineers, and tied to this corner at the place where it is located by the patent of the Nellie. A portion of the triangle which complainants now seek to include with their patent was patented to the owner of the Star Gazer claim without any objection on their part. Many other facts were established and many were disputed in the voluminous evidence taken in this case, but none of them are of sufficient importance to modify the effect of those which have been recited. How can the decree of the court below be lawfully reversed, in the light of this proof? The tie on which the complainants rely was a calculated course and distance from the corner in dispute to a hole in the ground on another claim found in the patent of that claim. In the notes of the survey of this second claim this course and distance was not a tie of this corner, nor was it any portion of the survey of the boundary of the claim, but it was a mere description of an improvement upon it, and it was imported into the patent from these notes. In the notes of the survey of the Nellie the courses and distances of its side lines constitute a part of the boundaries of that claim,—a portion of its survey,—and they were imported from these notes into the patent under which the complainants claim. The testimony is that the location of improvements upon mining claims is not made with that care and accuracy with which the boundaries of the claim are measured, marked, and noted, so that there is less

probability of a mistake in the lines which mark the boundaries than in the location of the improvements. This consideration is much strengthened by the fact that the great desideratum in the location of a lode mining claim—the chief end of its survey—is to ascertain and declare the true course of its vein, and of the side lines of the claim which inclose it, and which are generally drawn parallel to it, so that it may not escape from the locators.

Again, the location of the tunnels mentioned among the improvements upon the Nellie in the notes of its survey correspond with the location of corner No. 1 according to the courses and distances of the patent of that claim; and it is less probable that a mistake was made in locating both these tunnels, in ascertaining the course of the vein of the Nellie, and in surveying its side lines, than that there was an error in the course and distance from corner No. 1 to the discovery cut of the Ella. When all these considerations, and the facts that the location of this mining claim was made in 1877, that it was surveyed and located in 1881, that it was again surveyed for patent in 1883, that it was patented in 1890, that other claims have been located adjoining and about it in reliance upon its record location, that under one of them a patent has issued to a portion of the triangle which complainants now claim should be placed within the boundaries of their patent, and that the courses, distances, corners, and boundaries of this Nellie mining claim remained unassailed for 16 years,—when all these facts and circumstances are reviewed the conclusion becomes unavoidable that the fact that the course and distance from one of the corners of this claim to an improvement in another claim found in another patent does not correspond with the description of the side lines in this patent establishes no probability that there was an error in the courses and distances of the lines which bound it, but renders it far more probable that there was a mistake in the location of the improvement with which it is assailed. The

court below rendered a decree in accordance with this conclusion, and, even if there was a mere preponderance of evidence in favor of the theory of the complainants, the result below ought not to be disturbed, in the light of this testimony, under two well-established rules of equity jurisprudence. One of these rules is that patents, contracts, and conveyances, the accredited evidences of rights and titles, may not be set aside or modified for mistakes unless these mistakes are established by evidence that is plain and convincing beyond reasonable controversy. *Marxwell Land-Grant Case*, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; *U. S. v. American Bell Tel. Co.*, 167 U. S. 224, 251, 17 Sup. Ct. 809, 42 L. Ed. 144; *Howland v. Blake*, 97 U. S. 624, 626, 24 L. Ed. 1027; *Insurance Co. v. Nelson*, 103 U. S. 544, 549, 26 L. Ed. 436; *Insurance Co. v. Henderson*, 69 Fed. 762, 764, 16 C. C. A. 390, 392, 32 U. S. App. 536, 542; *Railroad Co. v. Belliwith*, 83 Fed. 437, 440, 28 C. C. A. 358, 361, 362, 55 U. S. App. 113, 120. Such evidences of the rights of parties bear with them a strong presumption of their correctness. They are generally prepared with deliberation, written with care, and made for the express purpose of solemnly recording the established rights, titles, and interests of those whom they concern. Patents issued by the government after surveys of the land and examinations of the rights of the grantees and of the nation are buttressed by a presumption of exactness peculiarly strong. Every step in their preparation is required to be performed by disinterested officials in accordance with express provisions of statutes. They are issued by the United States to evidence the nature and the extent of its grants, and they bear its official seal. They evidence the decisions of a quasi judicial tribunal—the interior department of the government—upon the rights of all parties to the land or privileges which they describe. They are recorded in the registries of titles, and all the world relies, and has the right to rely, upon their statements of the character, and the limits of

the rights of the grantees whom they name. In view of these well known facts, no mere preponderance of evidence, no loose, uncertain, conjectural proof, ought to be permitted to strike down or change the nature or the extent of these solemn grants of the nation. Nothing should be permitted to reach that result but evidence so clear, unequivocal, and convincing that it does not leave the issue in doubt. The proof in this case lacks every element of this character. When considered in the most favorable light, it is nothing but the balancing of probabilities of mistake between the courses and distances in the survey of the boundaries of the Nellie lode mining claim, and the course and distance from one of the corners of that claim to an improvement in an adjoining claim. It is loose, uncertain, unconvincing, and conjectural, and solemn grants of the United States cannot be annulled or reformed upon evidence of this character.

The other rule to which reference has been made is that where a chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be deemed to be presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, his findings should not be disturbed. *Exploration Co. v. Adams*, 104 Fed. 404, 408, 45 C. C. A. 185, 188; *Mann v. Bank*, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Burt*, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; *Plow Co. v. Carson*, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; *Trust Co. v. McClure*, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46. The able and persuasive arguments of counsel for complainants have not convinced us that the chancellor made any mistake of fact or fell

into any error of law in his disposition of this case. The patent under which the complainants held their land threw the burden of establishing the alleged mistake in it, by convincing proof, upon them in the court below, and the decision of the chancellor casts upon them the additional burden of showing his mistake in this court. They have failed to successfully bear either burden, and the decree below must be affirmed. It is so ordered.

ALLEN F. LINDSLEY V. THE UNION SILVER STAR MINING CO.

(26 Washington 301; 66 Pac. 382. Supreme Court. Oct. 17, 1901.)

¹No injunction to restrain working mines in Foreign Jurisdiction. The fact that the necessary parties are before a court of equity does not give it jurisdiction in proceedings to enjoin trespass and waste in a mine located in a foreign jurisdiction, where there is no further ground for equitable interference.

Appeal from Superior Court, Spokane County; WILLIAM E. RICHARDSON, Judge.

Bill by Allen F. Lindsley against the Union Silver Star Mining Company. Defendant's demurrer to the complaint was sustained, and from a judgment dismissing the cause plaintiff appeals. Affirmed.

STERN, HAMBLÉN & LUND, for appellant.

DOMER & ESTEP and WM. H. CLAGGETT, for respondent.

REAVIS, C. J. Plaintiff, a citizen of Idaho, filed his complaint in the superior court of Spokane county against the defendant and the Tacoma Smelting Company, which are domestic corporations. The complaint, in effect, alleges that plaintiff and others located mineral claims upon public vacant mineral land in Kootenai county, Idaho, and that plaintiff became the sole owner of such claims by transfers from his

¹*Johnstown Co. v. Butte Co.* 70 N. Y. Sup. 257.

May issue to another county where court has jurisdiction of the person. *Jennings Co. v. Beale*, 158 Pa. 283; 27 Atl. 948.

There being a suit pending where all questions as to apex rights may be determined, it is bad practice for defendant to bring counter suits and the prosecution of such counter suits was properly enjoined. *Maloney v. King*, — Mont. —; 76 Pac. 939.

colocators, and that he has in his possession all the surface of the claim located, named the "Imperial Lode Mineral Claim," and is the owner of the same, subject only to the paramount title of the United States; that he is the owner of all veins, lodes, and ledges of mineral in place contained in such claim which have their tops or apexes within the surface thereof, and has the right to follow such veins on their dip into the earth between the end lines of the claim drawn downward, and that a valuable lode or ledge of mineral rock in place enters the claim by the south end thereof, and passes through the entire length of the claim in a northerly direction nearly parallel with the side lines of the claim, and passes through the north end thereof, which vein or lode has its outcrop, top, or apex entirely within the surface lines of plaintiff's claim; that the defendant, the Union Silver Star Mining Company, claims to own the Little Joe quartz lode mineral claim on the easterly side, and immediately adjoining and overlapping plaintiff's claim, the Imperial lode mineral claim, and that the defendant corporation is engaged in mining and developing the ground; but plaintiff alleges that the Little Joe quartz lode mineral claim was never located and marked upon the ground as provided by law, and that the boundaries thereof do not take in or include the top or apex of the vein or lode mentioned. It is also alleged that the defendant Union Silver Star Mining Company has extended its tunnel in such a manner as to strike the vein the top or apex of which is within the Imperial lode, and has entered upon the vein without the consent of plaintiff, and against his objection; that it has mined and extracted from such vein large quantities of mineral containing gold, silver, lead, and copper, and other valuable minerals; that it has drifted into such vein or lode for a distance of about 450 feet, and is engaged in working such vein, and is preparing to extract ore therefrom, with full knowledge of the plaintiff's rights in the premises, and against his objections; that said defendant has already ex-

tracted and shipped to the Tacoma Smelting Company ore of at least the value of \$5,000, and has failed to account to plaintiff for any part thereof, and that such ore is in possession of the Tacoma Smelting Company. It is also alleged that the defendant Union Silver Star Mining Company is insolvent; that an action will be instituted with the utmost dispatch in the circuit court of the United States for the district of Idaho by plaintiff against the defendant Union Silver Star Mining Company to recover possession of the vein in controversy, and that this action is brought in aid thereof, and for the purpose of preserving the proceeds of the ores. The Tacoma Smelting Company was not served with process, and did not appear. A demurrer was filed by the defendant Union Silver Star Mining Company on two grounds: (1) That the court had no jurisdiction of the subject-matter of the action; (2) that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained generally, and, plaintiff electing to stand upon his complaint, judgment was entered dismissing the cause.

It is urged here by counsel for appellant that when the necessary parties are before a court of equity it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territory or jurisdiction of the tribunal. To support this general proposition, a number of authorities are cited, among which are *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; 3 Pom. Eq. § 1318; *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed. 181. The general proposition stated in *Phelps v. McDonald*, *supra*, is by the same court and others restricted to equitable suits. Counsel urges that the rule extends to suits for injunction to prevent trespass or waste in a foreign jurisdiction. The case of *Jennings Bros. & Co. v. Beale* (Pa.), 27 Atl. 948, is relied upon to maintain the present action, but an examination will show that a contract existed between the parties in that case, and the question involved was the construction of such contract. The

plaintiff alleged that the defendant had conveyed by deed to plaintiff the exclusive right to mine certain coal lands. The question before the court was the enforcement of the contract between the parties by the remedy of injunction. In *Massie v. Watts*, where the defendant in the original action is liable to the plaintiff in consequence of contract, or as trustee, or as the holder of the legal title acquired by any species of *mala fides* practiced on the plaintiff, it is decided that the principles of equity give the court jurisdiction wherever the person may be found; and the circumstance that the question of the title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest the jurisdiction. Again, in *Northern I. R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 14 L. Ed. 674, which was a suit by plaintiff to enjoin defendant in the circuit court for the district of Michigan from constructing its railroad over the lands of plaintiff situated in the district of Indiana, the court said:

"But wherever the subject matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the circuit court sitting within it. An action of ejectment cannot be maintained in the district of Michigan for land in any other district. Nor can an action *quare clausum fregit* be prosecuted where the act complained of was not done in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *locus in quo*."

In the examination of the authorities presented we observe no instance of such suit being maintained unless the controversy between the parties involves primarily equitable jurisdiction. It is apparent that the complaint involves in its essence the possession of the mining lode. The possession here is not incidental to the enforcement of a contract or trust or relief from fraud, but is in itself the foundation of the controversy. The parties are strangers to each other. The

mine, the possession of which is in controversy, is located in another state. The action, in its essence, is local. The demurrer was properly sustained.

Judgment affirmed.

FULLERTON, DUNBAR, ANDERS, and MOUNT, JJ., concur.

¹PEABODY GOLD MINING CO. v. GOLD HILL MINING CO.

(111 Federal 817. Circuit Court of Appeals, Ninth Circuit. October 21, 1901.)

²**Excess of width in lode patent. Delay to attack.** A patent for mineral lands, which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of the granted premises solely for the reason that upon its face it purports to be based on a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts.

Presumption in aid of patent. Where there might have been circumstances which, under existing laws, would have authorized the land department to include in a patent for mining ground all the ground therein described, it will be presumed in support of the patent, when collaterally attacked, that such circumstances existed.

Subsequent locator has no status. A suit to set aside a patent for mineral lands on the ground of fraud practiced on the land department cannot be maintained by a private individual, who had at the time no claim upon any of the lands, but made a location thereon subsequently, such ground of invalidity being available only to the United States.

Same—grounds for cancellation of patent—fraud. Allegations in a bill for the cancellation of a patent for mineral lands that the several claims embraced therein were falsely and fraudulently represented by defendant to the land department to be quartz claims, when they were, in fact, placer claims, afford no ground for the cancella-

¹Case on original bill, 97 Fed. 657. The case on amended bill as appealed, 21 M. R. 151.

For exhaustive brief on attack on patents and Federal jurisdiction in such cases see note to *Bailey v. Mosher*, 11 C. C. A. 308, and note to *Montana Co. v. Boston Co.* 35 C. C. A. 7, by H. Campbell Black.

²*U. S. v. Marshall Co.* 16 M. R. 205.

The statute of limitations does not begin to run when land is entered but when the patent issues. *Clark v. Barnard*, 15 Mont. 176; 38 Pac. 834. *South End Co. v. Tinney*, 22 Nev. 221; 38 Pac. 401. *Mayer v. Carothers*, 14 Mont. 274; 36 Pac. 182.

As to the running of the statute in cases of secret trespass or

tion of the patent, where the fact that they were placer claims would not have precluded the owner from obtaining a single patent therefor, and it is not shown that the government was in any way injured by the false representation.

Attempt to state federal question. A complainant cannot invoke the jurisdiction of a federal court by setting forth the contention which will be made by defendant in answering the bill upon which a federal question will arise.

Appeal from the Circuit Court of the United States for the Northern District of California.

The appellant, the Peabody Gold Mining Company, brought a suit against the appellee, the Gold Hill Mining Company, to quiet its title to certain mining property situate in Nevada county, Cal., consisting of three claims known as the "Peabody," the "Suum Quique," and the "Croesus." The bill alleges that these three claims constitute one mining property. The facts upon which relief is sought as set forth in the bill present two distinct causes of suit. So far as the Peabody claim is concerned, the bill alleges no more than title in the complainant and wrongful trespass thereon by the defendant. As to the other claims, the Suum Quique and the Croesus, it is alleged that both were located on September 7, 1898, and that the whole of the former and a portion of the latter are included within the surface area of the Gold Hill Quartz Lode Mining Claim, which was patented to the appellee on August 9, 1883; that the appellee's patent was obtained upon an affidavit showing that the Gold Hill Quartz Lode Mining Claim had been located about the year 1852, after the discovery of a vein or lode within its limits, which affidavit the bill alleges was false and fraudulent; that in

where the resulting injury is remote from the act ultimately resulting in damage, see *Sterrett v. Northport Co.* 30 Wash. 164; 70 Pac. 266. *Lewey v. Frick Co.* 18 M. R. 179.

Statute of limitations on debt payable out of proceeds of mine. *Charter Oak Co. v. Gisborne*, 5 Utah 319; 15 Pac. 253.

Construction of the clause in the mining act of 1872, R. S. § 2332, that possession of a mining claim during the limitation period shall give a right to a patent. *McCowan v. Maclay*, 16 Mont. 234; 40 Pac. 602. *Altoona Co. v. Integral Co.* 114 Cal. 100; 45 Pac. 1047.

Adverse possession may run in favor of a mining claim without paper title to start it on. *Minnesota Co. v. Brastier*, 18 Mont. 444; 45 Pac. 632.

And is equivalent to a location. *Altoona Co. v. Integral Co.* 114 Cal. 100; 45 Pac. 1047.

fact the claim was not located as a quartz claim, but comprised a consolidation of numerous separate and distinct placer claims, none of which were valid as quartz claims under the mining laws or mining rules and regulations of the time; and that the said patent was fraudulently obtained. The bill also alleges that the patent was issued in violation of the act of congress of May 10, 1872, limiting the right of the land department to issue a patent for a mining claim to surface ground 300 feet on each side of the middle of the vein or lode patented; that the whole of the Suum Quique and a portion of the Croesus are located upon land included within the surface boundaries of the Gold Hill claim, but which lie east of a line drawn parallel with and 300 feet east of the center of the lode. It is alleged that as to the land so included in the patent exterior to a line parallel with and 300 feet from the said lode or vein the patent is void. The bill further alleges that in violation of the rights of the appellant the appellee has trespassed upon the appellant's said claims beyond the 300-foot line from the center of the lode, asserting its right so to do under its patent. To this bill the appellee demurred for want of equity, and for the reason that it appeared from the bill that the Suum Quique and a portion of the Croesus lodes are within the patented surface boundaries of the Gold Hill claim; and further demurred to so much of the bill as concerns the Peabody claim for the reason that the court has no jurisdiction thereof, since no federal question is involved. The circuit court sustained the demurrer, and from that ruling the present appeal is taken.

A. H. RICKETTS, for appellant.

E. W. MCGRAW, for appellee.

Continuous use of water for long period makes prima facie title. *Herriman Co. v. Butterfield Co.* 19 Utah 453; 57 Pac. 537.

The question of adverse possession must be submitted as a fact to the jury. *Woods v. Montevallo Coal Co.* 84 Ala. 560; 3 So. 475.

Suit to declare a trust does not prevent running of statute against bill for accounting. *Mantle v. Speculator Co.* — Mont. —; 71 Pac. 665.

Possession during statutory period makes complete title. *Lavagnino v. Uhlig*; 26 Utah 1; 22 M. R. —.

Where a reasonable time to perform must elapse before plaintiff could have a right of action the statutory limitation does not begin to run until after the lapse of such reasonable time. *White v. Century Co.* — Utah —; 78 Pac. 868.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill directs an attack against the patent upon two grounds: First, that it covers surface ground in excess of 300 feet in width from the center line of the lode, and is as to such excess void; second, that it was procured by false representations to the officers of the land department, and therefore should be set aside and annulled. As to the first ground, it is alleged in the bill that up to the time of the issuance of the patent, August 9, 1883, and for some time thereafter, there had been discovered upon the premises covered by the patent but one vein or lode, and that lode or vein, as shown upon the map and the field notes accompanying the patent, ran in a straight line along the western boundary of the patented premises. Does it follow from these facts that the patent is void as to the surface therein contained which lies beyond and eastward of the line 300 feet from the center of the lode? If, upon any theory of the facts, the patent may be sustained, it is the duty of the court to indulge the presumption that the facts existed, and were properly brought to the attention of the officers of the land department, before the patent was issued. All intendments are in favor of the validity of the patent. Before it was issued, the officers of the land department were required to ascertain whether the necessary antecedent steps had been taken which justified its issue. They acted upon the papers and proofs which were presented, and thereupon based their conclusion. It was their duty to investigate the facts, and it must be presumed that such investigation was had. The issuance of the patent was a judicial determination of the patentee's rights. It cannot be disputed that facts might have existed which would have authorized the issuance of the

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patent for all the surface ground described therein as a quartz lode claim. We think the bill itself suggests such a state of facts. It sets forth the survey of the mining claim and the affidavits which accompanied it. It appears therefrom that the survey was made in August, 1881. In the report of the deputy mineral surveyor and in the affidavit of the oldest discoverer of the Gold Hill ledge and the first locator of a claim thereon it was stated that the first discovery of quartz rock on the lode was made in the year 1850, and that thereupon numerous other claims were made, all of which were 30 by 40 feet by local mining rules; that from the time of the discovery the said mining claims had been continuously mined, and that at the time of the survey \$3,000,000 had been taken therefrom; that in 1877 the appellee became the owner of the mining premises which were included in the patent, having acquired the same by purchase from the original locators. If it be true, as shown by these exhibits to the bill, that the claim thus patented consisted of an aggregation of small quartz mining claims located under the local mining rules and regulations, which claims were subsequently conveyed to the appellee, there was no reason why they might not all have been combined and included in one patent. The right to so combine them and to obtain the patent therefor is not impaired by the fact that the proceedings on which the patent was issued purport to have been instituted and carried out for the acquisition of a single quartz mining claim under the provisions of the act of congress of May 10, 1872. A patent which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of its granted premises solely for the reason that upon its face it purports to be based upon a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and

might have been united in a single patent upon a proper presentation of the facts. In *Polk's Lessee v. Wendal*, 9 Cranch, 87, 3 L. Ed. 665, it was held that a patent of the state of North Carolina for 25,000 acres of land was not void upon its face for the reason that it covered more than 5,000 acres, which was the limit prescribed for a single entry by the laws of that state; and that there was nothing to prevent a person from making several entries, or from purchasing the rights acquired by other entrymen, and uniting several entries in one survey and patent. So, in *Refining Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875, where the patent described by metes and bounds premises containing 164.64 acres, more or less, it was held that a patent issued subsequently to the passage of the act of July 9, 1870, may embrace a placer claim consisting of more than 160 acres, and including as many adjoining locations as the patentee had purchased. Said the court in that case:

"A patent in a court of law is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if, in any circumstances, under existing law, a patent would be held valid, it will be presumed that such circumstances existed. * * * On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

In *Tucker v. Masser*, 113 U. S. 203, 5 Sup. Ct. 420, 28 L. Ed. 979, the doctrine of *Refining Co. v. Kemp* was carefully considered and affirmed.

The appellant relies upon the decision of this court in *Lakin v. Roberts*, 4 C. C. A. 438, 54 Fed. 461, and particularly upon the language of the opinion where it was said:

"The land department, therefore, had no power to issue a patent for a greater width of land than 300 feet, and the patent in this case in excess of 300 feet is void."

The judgment in that case was rendered upon an agreed statement of facts, in which it was made to appear that the land in controversy, which was occupied as a town site, was included within the area of the patented mining claim, but that there had never been any actual possession of that portion of the surface ground by the mining company, and that the right of the miners in that locality to a mining claim was not determined by rule or custom, but depended upon actual occupation of the surface. Under this admission of the facts, the land in controversy in that case was held to be excluded from the operation of the patent. The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his grant, and that all the previous requisites of the law had been complied with.

But the bill, after setting forth the patent, and the representations made to the surveyor general upon which it was issued, proceeds to allege that the representations were false, and were fraudulently made, with the intention to deceive the surveyor general; and it seeks upon that ground to impeach and set aside the patent. It is charged that in the affidavit accompanying the survey it was falsely stated that the original mining claims which were contained in the survey were quartz lode mining claims, whereas in fact they were placer claims located and held in accordance with the laws of miners on Gold Hill, and that none thereof was valid under the mining laws of any district, or rules, regulations,

or customs for the acquisition and holding of quartz claims. In brief, the allegation is that the surveyor general was led to believe that the claims were quartz claims, when the fact was that they were placer claims. We discover in these facts no ground upon which to set aside the patent. It is not alleged that fraud was practiced against the rights of the appellant. On the contrary, it appears from the bill that the location of the appellant's claims dates no further back than 1898. The present suit was commenced almost immediately after the locations were made. Under such circumstances a suit to set aside the existing patent on the ground of frauds alleged in the bill can only be instituted in the name of the United States. *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226. But, conceding it to be true that the nature of the mining claims was falsely represented as alleged in the bill, it does not follow that fraud was practiced upon the government, or that title was thereby acquired which could not lawfully have been acquired by the patentee. The fact that the claims were placer mining claims instead of quartz mining claims would not have precluded the owner thereof from obtaining a single patent therefor. The bill does not advise us that the government has been in any way injured by the deception or by the false representation. The price per acre paid for the land patented as a quartz mining claim was greater than would have been the price per acre for placer claims. In short, the averments of the bill, viewed in any possible light, would be wholly insufficient to justify a court of equity, even at the suit of the United States, in setting aside the patent on the ground that fraud was practiced in obtaining it.

The foregoing discussion refers only to the averments of the bill concerning trespass upon those portions of the mining ground claimed by the appellant which lie within the surface ground patented to the appellee. So far as the remaining premises are concerned, and upon which the bill

charges that the appellee has trespassed, no ground for the jurisdiction of the circuit court is presented. The bill attempts to show the existence of a federal question by setting forth the contention which will be made by the appellee when it comes to answer the bill. This is insufficient. *Metcalf v. City of Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35, 37 L. Ed. 1030; *Railroad Co. v. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766.

The decree of the circuit court will be affirmed.

SOUTH PENN OIL CO. v. LATSHAW.

(111 Federal 598. Circuit Court of Appeals, Fourth Circuit. November 6, 1901.)

Motion for new trial not reviewable. Under the practice of the federal courts, the ruling on a motion for new trial is not reviewable.

The refusal of instructions asked cannot be reviewed on appeal unless the bill of exceptions contains the evidence relied on to make such instructions applicable to the case as submitted to the jury.

Errors not excepted to. Where but a single exception was taken, and a single assignment of error is made, covering the giving of certain instructions, the refusal to give others, and the charge as given, no question is presented which will be considered by the appellate court.

Fishing for tools an ordinary risk in oil sinking. In an action to recover for the drilling of an oil well, which was made under a written contract by which the plaintiff agreed to complete and clean the well and deliver it to defendant for a stipulated price per foot, he cannot recover for time lost in fishing for tools in such well, the necessity for which was one of the risks he assumed by his contract.

In error to the Circuit Court of the United States for the District of West Virginia.

¹The contractor takes the risk of the accidents of the business. *Janes v. Scott*, 7 M. R. 181.

Unexpected fall off in grade of coal, an excuse for literal breach of covenant. *Givens v. Providence Co.* 22 Ky. L. R. 1217; 60 S. W. 304.

Lessor was to pay one-half cost of all wells which did not produce a certain amount of oil per day: *Held* that such cost included the expense of all preliminary work, erecting the derrick and the value of the use of the machinery furnished by the lessee. *Far West Co. v. Witmer Bros. Co.* 143 Cal. 306; 77 Pac. 61.

Construction of contract to sink oil well with special terms as to pumping water, holding that the money was earned although the water drowned the well. *Vail v. Freeman*, 144 Cal. 356; 77 Pac. 974.

Contractor prevented from further sinking by accident (breaking of bit) allowed on construction of terms of contract to recover for the footage already worked. *Cook v. Columbian Co.* 144 Cal. 670; 78 Pac. 287.

T. P. JACOBS and R. F. FLEMING (A. B. FLEMING, M. F. ELLIOTT, and U. N. ARNETT, on the brief), for plaintiff in error.

V. B. ARCHER (WM. BEARD, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. This is an action of trespass on the case in assumpsit, the declaration consisting of the common counts with a bill of particulars. The defendant in error was plaintiff below, where he sued the South Penn Oil Company to recover a sum claimed by him to be due by it for the drilling of an oil well in Marion county, W. Va., and for "fishing for lost tools" in said well during the time it was being so drilled. The defendant below pleaded the general issue. The case was tried to a jury, and a verdict returned in favor of said Latshaw for the sum of \$10,768, on which a judgment was duly rendered. The writ of error now under consideration was then applied for and granted.

A great number of errors are assigned, but a few only of them will, for reasons hereinafter given, be considered by this court.

The assignment relating to the refusal of the court below to set aside the verdict because it was contrary to the law and the evidence is without merit. The ruling of the court below on a motion for a new trial is not reviewable in this court. *Pomeroy's Lessee v. Bank*, 1 Wall. 592; *Ayers v. Watson*, 137 U. S. 584; *Railway Co. v. Heck*, 102 U. S. 120; *Improvement Co. v. Frari*, 58 Fed. 171.

The assignments of error pertaining to the refusal of the court to give certain instructions asked for by the defendant below should not be considered by this court, for the reason

that the evidence, if any there was, by which the relevancy of the instructions refused could have been shown, is neither quoted in full nor its substance set forth in the bill of exceptions relating thereto. Indeed, there seems to have been in the preparation of the bill of exceptions an utter disregard of the rules of this court, as also of the practice in matters of this character as established by the decisions of this court and of the supreme court of the United States. The reasons for the making and for the enforcement of said rules, as well as for the observance of the practice so established, have been frequently given. *Insurance Co. v. Raddin*, 120 U. S. 183; *Block v. Darling*, 140 U. S. 234; *Van Gunden v. Iron Co.* 52 Fed. 838; *Newman v. Iron Co.* 80 Fed. 228. Such being the bill of exceptions, we must presume that there was an utter absence of such testimony as made the instructions refused pertinent, in which event the court below properly rejected them. The bill of exceptions should have shown all the testimony relied on to make the propositions of law included in the instructions applicable to the case as presented to the jury. *Jones v. Buckell*, 104 U. S. 554.

The assignments of error concerning the giving of certain instructions prayed for by the plaintiff below, as well as those having reference to the court's instructions and charge, must also be disregarded by this court, because they repeatedly and palpably violate its well-established rule which restricts an assignment of error to one distinct proposition. *Clark v. Deere & Mansur Co.* 80 Fed. 534; *Newman v. Iron Co.* 80 Fed. 228. A separate assignment of error in respect to each part of the court's charge alleged to be erroneous, as well as to each instruction given, should have been taken. *Vider v. O'Brien*, 62 Fed. 326. In the case we are now disposing of, the giving of certain instructions, the refusal to give others, and the exceptions to the court's charge are all combined in one exception and in one assignment of error.

After all the evidence had been submitted, the defendant

below asked the court to instruct the jury that the plaintiff was not entitled to recover because of anything in his bill of particulars relating to fishing for lost tools during the time the well was being drilled. The court refused to give that instruction, an exception was duly noted, and in the bill of exceptions appears all the testimony offered bearing on that point. The proper disposition of this prayer of the defendant below required not only a careful examination of all the testimony, but also of the pleadings, as well as the construing by the court of the written contract, under which it is clear that the well was drilled. It appears from the record that the South Penn Oil Company, on the 27th day of August, 1894, entered into a written contract with Latshaw, by which he was to drill for said company, in Mannington district, Marion county, W. Va., an oil or gas well in the manner, to the depth, and for the compensation, and under the terms set forth in said contract; that Latshaw began drilling at a point selected by the officials of said oil company, and prosecuted the work for a short time, when he was informed by them that the company had decided to change the location to a certain other locality, which was pointed out to him; that the rig and tools were then removed to said new location, and that Latshaw there drilled the well to about the depth of 2,926 feet, and before he had completed the same the tools became fastened in the well and could not be removed; that the charge for fishing for the lost tools, set forth in the bill of particulars, was for labor expended in endeavoring to recover the tools so stuck in the well. The plaintiff below testified that he drilled the well so located at the second point under the terms and condition of the written contract. In fact, all the testimony clearly shows that the drilling was proceeded with under the written contract, and that there was simply a change in the location of the well. The instruction asked for by the defendant below required the construing of said contract by the court, and the deter-

mination of the question whether, by the terms of the same, the contractor was entitled to charge for labor attending the fishing for lost tools. We think that it clearly appears by the written contract that Latshaw was to complete the well, clean the same, and deliver it to the South Penn Oil Company, before he was entitled to any compensation therefor. This was not only so by the terms of the written contract, but also by the usage or custom of that oil field, concerning which quite a number of experts testified. The expense attending the completion of the well, which certainly included all expenditures made on account of fishing as well as those for drilling, was chargeable to Latshaw, and his compensation was to have been determined by the depth of the well, a certain sum per foot having been agreed upon. There is no evidence tending to show that the contract was abandoned, or that any of its terms were changed. Such being the case submitted to the jury, we are of the opinion that the instruction so asked for by the defendant below should have been given. Under the contract the plaintiff should have been restricted to the items in his bill of particulars relating to the drilling of the well, and testimony concerning other matters should have been excluded. This may, under the unfortunate circumstances attending said work, produce a result far from satisfactory to the contractor, and it may entail considerable loss upon him, but that, while much to be regretted, cannot be avoided, and it was one of the elements of the risk he assumed when he undertook to drill the well. The contract was made by parties capable of entering into it, and they must now stand by their agreement, whatever be the result reached by its observance.

For the error referred to, the judgment of the court below must be reversed, the verdict of the jury set aside, and a new trial awarded. Reversed.

SAMUEL KEPPEL ET AL. v. LEHIGH COAL & NAVIGATION CO.

(200 Pennsylvania 649; 50 Atl. 302. Supreme Court. Nov. 8, 1901.)

Continuous trespass enjoined. Injunction is the proper remedy for the prevention of trespasses and nuisances, which by reason of the persistency with which they are repeated, threaten to become of a permanent nature.

Coal tailings restrained. Where a coal mining company so conducts its operations as to cause a continuous discharge of culm into a stream, and the culm is carried down the stream, and continuously accumulates in a dam and race of a mill, equipped for both steam and water power, the owners of the mill are entitled to an injunction to restrain the continuance of the nuisance, and also to damages for the injuries sustained to the time of suit.

Measure of damages. In such a case the owners of the mill are entitled to recover as damages (1) the increased cost of running the mill by steam, in so far as it was made necessary by the diminished water power, occasioned by the introduction of culm and dirt by the defendant; and (2) the cost of cleaning out the culm and dirt from the dams and mill race. They are not entitled, however, to recover the cost of a new arrangement of gateways and sluices intended to keep the mill and the race clear in the future. The injunction will protect them from future interference.

¹One cannot suspend business because coal not furnished according to contract and recover his lost profits as damages for the breach. *Bannon v. St. Bernard Co.* 18 Ky. L. R. 1050; 39 S. W. 252.

In estimating damages for the stoppage of a mill the jury may take into consideration the wages of the men thrown out of work. *Parley's Park M. Co. v. Orr*, 17 M. R. 201.

The measure of damages for the breach of a contract for the purchase of coal which provided for future payment is the difference between the contract price and the market price at the time of delivery. *Osgood v. Bauder*, 75 Ia. 550; 39 N. W. 887.

Measure of recovery for shaft, the sinking of which was ordered stopped before complete. *Mooney v. York Co.* 82 Mich. 263; 46 N. W. 376.

Measure of damages for diverting water from mill site. *Southern Co. v. Darnell*, 94 Ga. 231; 21 S. E. 531.

Measure of damages in action against smelting works for killing trees. *Kansas Co. v. Brown*, 8 Kans. App. 802; 57 Pac. 304.

Measure of damages for removal of tailings cannot exceed the value

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Measure of Damages
Lehigh Coal & Navigation Co. v. Miners' Union, Schuylkill County.
Providence for Samuel R. Keppel and others against the
Lehigh Coal & Navigation Company. From a judgment
awarding plaintiffs an injunction and awarding damages, de-
fendant appeals. Affirmed as to injunction, and reversed as
to the damages.

The court entered the following decree:

1. That the said the Lehigh Coal and Navigation Company, de-
fendant, its workmen, agents and employees, its successors and
assigns and their workmen, agents and employees, be perpetually
restrained from discharging into Panther creek, and from permitting
to escape into said Panther creek, from any of its collieries owned
and operated by it or its successors or assigns, any coal dirt, culm
or muck or other refuse from said collieries and from so depositing
its said coal dirt, culm, muck and refuse from its mines and col-
lieries that the same may be, from time to time, carried by the

of the land. *Stevenson v. Ebervale Co.* 201 Pa. 112; 50 Atl. 818.
Harvey v. Sides Co. 10 M. R. 107.

Measure of damages for breach of contract by lessee of gas well
to test it for oil. *McClay v. Western Co.* 21 M. R. —.

Damages in case of delay in furnishing machinery for smelter;
lost profits not allowed. *Fraser v. Echo Co.* 9 Tex. Civ. App. 210;
28 S. W. 714.

Measure of damage where plaintiff was not the owner of the stone
removed, but only had the right to quarry it himself. *O'Connor*
v. Shannon, (Tex.) 30 S. W. 1096.

Measure of damages for "failure to comply with contract and
construct tunnel and drift so as to connect the Sutro Tunnel with
the mining claims owned by plaintiff." Heavy verdict sustained.
Occidental Co. v. Comstock Co. 125 Fed. 244.

Where plaintiff claims damages he must prove some amount; and
the jury can not arbitrarily fix the amount without such proof.
Orient Co. v. Freckleton, 27 Utah 125; 74 Pac. 652.

On breach of contract to deliver output of a coal mine, difference
between the contract and the market price adopted as the measure
of damages. *Wilmoth v. Hamilton*, 127 Fed. 49.

On a contract to deliver to a smelter, so many thousand tons of

ordinary rains and freshets into said creek and from polluting the waters of said Panther creek as set forth in complainant's bill of complaint.

2. That the defendant pay the plaintiff the sum of \$4,900, being the damages which the plaintiffs have sustained to the time of trial, by reason of the defendant having unlawfully polluted the waters of said Panther creek.

3. That the cost of this proceeding be paid by the defendant within thirty days from the filing hereof.

F. G. FARQUHAR and JOHN W. RYON and SAMUEL DICKSON, for appellant.

G. H. GERBER and R. P. SHICK, for appellees.

POTTER, J. The plaintiffs are the owners of about 23 acres of land on the Little Schuylkill river, in Schuylkill county, Pa., on which is a water power flour mill, with the usual dam and races. The defendant is the owner and oper-

sulphide ores of no specified assay or mineral content: *Held* that plaintiff was only entitled to nominal damages for breach. *Patrick v. Colo. S. M. Co.*, 20 Colo. 268.

The measure of damages against a smelter for destroying crops by noxious gases is the value of the crop when injured; not the market value of the perfected crop. *Lester v. Highland Boy Co.* — Utah —; 76 Pac. 341.

For stock unlawfully converted the owner is entitled to recover the highest value between time of conversion and a reasonable time for replacing it, with interest and any dividends received. *Doyle v. Burns*, — Ia. —; 99 N. W. 195.

Measure of damages and procedure in case where vendee has fraudulently procured deed for less than the agreed consideration but has entered and made large expenditures. *Gillis v. Arringdale*, 135 N. C. 295; 47 S. E. 429.

Plaintiff is only allowed nominal damages where he does not prove value of the sand taken and exemplary damages are not allowable for a trespass not malicious or persistent. *Murray v. Pannaci*, 130 Fed. 529.

Where plaintiff's contract to open up a mine is not completed because of defendant's default in furnishing supplies; plaintiff may recover for work already done. *Degnan v. Nowlin*, — Ind. Ter. —; 82 S. W. 758.

ator of coal mines situate on and near Panther creek, a stream tributary to the Little Schuylkill river, above the lands of the plaintiffs. In the operation of its mines the defendant has placed culm banks along and near Panther creek, and has allowed its mine water and the wash water from its breakers and washeries to reach Panther creek more or less charged with coal dirt. The coal dirt in this water, and that which has been eroded from the culm banks by rains, and to some extent by the action of the stream on their bases, has been carried down to the plaintiffs' dam, and deposited there, filling the same, and impairing the plaintiff's water power. It is of this injury only, to their water power, by the accumulation of coal dirt in their dam, and also in the race, that the plaintiffs complain. Their flour mill is equipped with steam power in addition to the water power, for the reason that at certain seasons of the year the water in the stream is too low to furnish power. This bill in equity was filed against the defendant company, praying that it be enjoined and restrained from discharging into the Little Schuylkill river or its tributaries the coal dirt, refuse, or polluted waters from its breakers, mines, or washeries, and from washing, or placing any such dirt, culm, or refuse where it might be washed or escape into the said river or its tributaries.

The court below found that the injury to the plaintiffs was not permanent, and that the dam and race can be cleared of coal dirt at a cost very much less than the value of the water power. But, while this is true, yet the very nature of the operation showed that, as heretofore conducted, there was practically a continuous interference with the proper use of the water power by means of an undue loading of the stream with dirt or culm. Accordingly, a perpetual injunction was granted to restrain the defendant from polluting the waters of Panther creek in the manner described in the bill and as set forth in great detail in the testimony. In addition to

this, the learned court, in his decree, assessed the damages sustained by the plaintiffs at the sum of \$4,900.

The testimony in this case is voluminous, but we have examined it very carefully. We are satisfied that the case is one in which it is proper for a court of equity to interpose for the purpose of restraining a continuous trespass.

It is not to be doubted that an injunction is the appropriate remedy for the prevention of trespasses and nuisances which, by reason of the persistency with which they are repeated, threaten to become of a permanent nature. Ample authority may be found to sustain this proposition in the line of cases culminating in *Fricke v. Quinn*, 188 Pa. 480, 41 Atl. 737; *Walters v. McElroy*, 151 Pa. 549, 25 Atl. 125. In so far, therefore, as the decree restrains the defendant from polluting the waters of Panther creek, it may be sustained.

It has become the established course of procedure in Pennsylvania, where a bill for the purpose of injunction is sustained, to connect with it the account, without compelling the plaintiff to go into a court of law for damages. When, therefore, as in this case, the plaintiffs' right to an injunction is established, an account of the damages sustained follows as an incident, and to avoid a multiplicity of suits. *Walters v. McElroy*, 151 Pa. 558, 25 Atl. 125.

But in this case the opinion of the court below does not set forth the rule which was adopted in computing the damages, and gives no indication of the manner in which the amount was ascertained. A close study of the testimony fails to disclose any basis of computation which yields the sum awarded.

The plaintiffs were entitled to recover as damages—First, the increased cost of running the mill by steam, in so far as it was made necessary by the diminished water power, occasioned by the introduction of culm and dirt by the defendant; second, the cost of cleaning out the culm and dirt from their dam and mill race.

As to the first item,—the increased cost of steam during

the years for which complaint is made,—the testimony seems to show pretty clearly that it amounted to the sum of \$1,021.23; but, whatever it may have been, the proper measure of this element of the damages is the actual cost of steam made necessary by the defendant's interference with the water power. As to the other item, it appears clearly from the testimony that the dam and race can be cleaned out, and that they will then be restored to their original condition. The cost of this cleaning of the dam and race does not definitely appear from the evidence. The amount awarded by the court for this purpose—\$900—included not merely the cost of cleaning the dam and the race, but of providing a new arrangement of gateways and sluices, which would not only clear out the premises, but would tend to keep them clear in the future. This is more than the plaintiffs have a right to ask. The injunction will protect them from future interference in so far as the defendant is concerned, so that the item of \$900, awarded by the court to cover this particular, is entirely too large, and is not justified by the evidence. The actual cost of clearing out the premises is the proper measure as to this item. Some additional testimony may be required to fix this amount.

It is therefore ordered that so much of the decree in this case as awards a perpetual injunction to restrain the defendant from polluting the waters of Panther creek in the manner set forth in the said bill of complaint be affirmed, and it is further ordered that the record be remitted to the court below for the purpose of restating the account of the damages in accordance with this opinion, and for the entry of a final decree against the defendant for the payment of the sum so found, together with the costs of suit.

GEO. W. LYNCH v. J. R. BURFORD.

(201 Pennsylvania 52; 50 Atl. 228. Supreme Court. Nov. 8, 1901.)

¹**Lessor no right to sink within fire reserve.** A lease for oil and gas purposes was subject to a reservation that no well should be sunk within a certain area enclosing buildings "as a protection against fire." *Held*, that the lessor had no right to drill a well within the limits of such reservation.

A neighborly assistance about a well in process of drilling is not to be construed as a waiver of the party's contention that the parties had no right to sink such well.

Appeal from Court of Common Pleas, Armstrong County.

Action of George W. Lynch against J. R. Burford. Judgment for defendant, and plaintiff appeals. Affirmed.

PATTON, P. J., filed the following opinion:

FINDING OF FACTS.

1. J. R. Burford is the owner of one hundred and six acres of land in Perry township, Armstrong county. Prior to January 25, 1899, but forty acres of this land was leased

¹A protection of so many rods east and north includes the area at the corners between projected lines and injunction lies to prevent boring on the protection. *Allison's App.* 11 M. R. 142.

Where lessees right to sink is confined to certain sites, he nevertheless has the protection of the entire area of the demise. *Duffield v. Rosenzweig*, 144 Pa. 520; 23 Atl. 4. *Duffield v. Hue*, 136 Pa. 602; 20 Atl. 526.

Where a number of lots were conveyed with a covenant in each deed to not sink gas wells, a lot owner will not be enjoined where it is shown that the grantor himself has driven a well on an unsold lot in violation of the spirit of the contract which intended that no wells at all should be sunk on the platted ground. *Acheson's App.* 130 Pa. 633; 18 Atl. 873.

for oil purposes. This forty-acre lease was known as the "Quigley Lease," and is owned by Mrs. Lynch, the mother of plaintiff. It has one producing oil well upon it, which is and has been operated by the plaintiff for his mother. It is adjacent to the lease in dispute.

2. On the 25th day of January, 1899, said J. R. Burford, the defendant, agreed to lease to Geo. W. Lynch, the plaintiff, "a certain tract of land, situate in aforesaid township, county, and state, for the purpose of drilling and testing the same for oil, for the period of fifteen years from this date, or as long as oil is obtained in paying quantities; said lease beginning at southwest corner of farm, and extending on a line with wells now producing on the Burford and Hiles farms, respectively, northeast to junction with Quigley lease on Burford farm. Said lease covers ten rods on each side of line, containing five acres, more or less, subject to a reservation of land surrounding farm buildings, and marked by stakes, and as a protection against fire. Said second party to drill one well on this lease within ninety days from date of this lease, and, if oil is obtained, paying unto said first party one-eighth royalty of all oil or gas obtained on said lease. Said first party retains and reserves all rights and privileges to this property except what is necessary to drill, test, and save oil or gas from this lease."

3. In pursuance to this lease Geo. W. Lynch, on April 20, 1899, began to drill a well known as "Lynch No. 1" on said five-acre tract, and completed the same on May 19, 1899, at a cost of \$2,000. It has been pumped by him ever since, and is a paying producing well. This well is about 800 feet from the reservation in the lease.

4. In the fall of 1899, Geo. W. Lynch, with the knowledge and consent of J. R. Burford, located another well, known as "Lynch Well No. 2," upon the five-acre tract. Prior to its location Burford had staked off the reservation mentioned in the lease, making a circle from 195 to 200 feet

around his farm buildings. This well was located 1 foot 1 inch without the reservation, and within 195 feet and 4 inches of Burford barn, and about 800 feet from the Lynch well No. 1, mentioned in third paragraph of findings of fact. Lynch finished the rig to put down this well early in the fall of 1900, laid his water line, but never commenced to drill the well, alleging as an excuse that he had so much trouble with the Lynch well No. 1 that he had not time to do so. On March 27, 1901, Burford prepared two notices which he had served upon Lynch, notifying him to remove his tools and rig, and not to put any more wells down upon the lease.

5. In the early part of June, 1901, J. R. Burford erected a derrick on the five-acre tract about 23 feet within the reservation staked off by Burford under the provisions of the lease, and 24 feet nearer his buildings than the Lynch well No. 2, said Lynch well No. 2 being located 195 feet 4 inches from Burford's barn. The Burford well is about 824 feet from the Lynch well No. 1, which is producing a small amount of oil. About June 13, 1901, Lynch learned that Burford was about to drill his well within the reservation as above described. He had graded the ground, and put in part of the mud sills. On the 17th day of June, 1901, Lynch served the notice on Burford (a copy of which is attached to plaintiff's bill) "not to drill a well, or otherwise interfere with the lease on your farm, containing five acres, and held by George W. Lynch. Any attempt on your part to put down said well, or otherwise interfere with said lease, will be met by an injunction."

Notwithstanding this notice, Burford proceeded to put down the well, and had so proceeded that he had it down between 1,400 and 1,600 feet, or about 100 feet of the oil-producing rock, on July 29, 1901, when this injunction was granted.

CONCLUSIONS OF LAW.

The question of law before us to decide is whether or not, under the facts stated in our findings, J. R. Burford has the right to drill in a well, and take out the oil upon the reservation mentioned in the lease. The question is not a new one, and leases somewhat similar have been construed by the supreme court.

As early as 1866 the case of *Funk v. Haldeman*, 53 Pa. 229, was before the court. In that case McElheny made an agreement with Funk to give him the free and uninterrupted use and privilege to go on any part of the 200 acres for the purpose of prospecting, digging, etc., to find any oil, etc., and of taking the same out of the earth.

The supreme court, in construing this agreement, says: "Now, although there is no express stipulation that his mining rights shall be exclusive of the grantors, is it not a fair and necessary inference from the premises? It is conceivable that the parties meant that when, after much labor and large expenditures, Funk should strike oil, the grantors might sink wells on the adjoining acre, and take not only a third of Funk's product, but all they could pump from their own wells, though they should dry up and ruin his wells altogether? If so, to what end were the premises so carefully marked out and divided between the parties?" In the case of *Westmoreland Gas Co. v. De Witt*, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731, J. H. Brown leased to J. M. Guffey & Co. a tract of land for the sole and only purpose of drilling and operating wells, etc. "No wells to be drilled within three hundred yards of the brick and stone building belonging to J. H. Brown." De Witt, the assignee of Brown, began the erection of a derrick to bore for gas within three hundred yards of the building, and was enjoined; Mr. Justice Mitchel saying: "From the nature of gas and gas operations already discussed, the grant of well rights is

necessarily exclusive. It was so held even as to oil wells in *Funk v. Haldeman*, 53 Pa. 229, 247, 248, although in that case the plaintiff had a mere license to enter, etc., and not, as complainants here, a lease of the land; and it is exclusive in the present case over the whole tract. As already said, the clause relative to the three hundred yard distance was a restriction on the privilege granted, not a reservation of any land or any boring rights to the lessor." In *Duffield v. Hue*, 136 Pa. 602, 20 Atl. 526, the lessee was restricted to certain sites in putting down wells, and in construing the rights of the lessees under this agreement the supreme court says: "The lessee, however, had the protection of the entire premises, and equity has jurisdiction to restrain the lessor, or others acting under him, from drilling wells thereon outside of such designated sites, and thereby lessening the production of the wells drilled by the lessee, such injury being destructive of his rights, and incapable of adequate remedy at law."

To the same effect is the case of *Duffield v. Rosenzweig*, 144 Pa. 520, 23 Atl. 4.

Taking these cases as our guide, it seems clear to us that Burford has no right to drill a well on the so called "reservation" against the will and protest of his lessee. From the time the lease was given, January 25, 1899, to March, 1901, when he had a difficulty with his tenant, no such a construction of the lease appears to have entered his mind. It is only after he thought that Lynch was not prosecuting the operations upon his land with due diligence that Burford undertook to increase his production by putting a well down on the reservation. Thus it appears that the parties to the contract for two years and upward construed the contract as we now construe it. Contemporaneous construction of a contract by the parties is some help to a court in reaching a conclusion as to its true meaning.

One of the reasons given in the lease for the reservation

is "a protection against fire." Could Lynch have imagined, at the time he entered this contract, that he could not build a derrick within 200 feet of Burford's buildings, and drill a well thereon, lest it might fire his buildings, and yet Burford would have the privilege of putting up a derrick still 24 feet closer to his buildings, and not endanger them?

Lynch has the right, under the agreement, to drill, test, and save oil or gas from this lease. But, if Burford is allowed to drill his well Lynch cannot save all his oil, for, as soon as Burford begins to pump his well, part of the oil within the bounds of Lynch's lease is lost to him, and goes into the possession of Burford,—something evidently not contemplated by the parties at the time the contract was made.

"Said lease covers ten rods on each side of said line, containing five acres, more or less." This means the whole five acres. But the lessee cannot drill within a certain distance of Burford's buildings. Why? One reason given in the lease is damage from fire. Other reasons for not wanting an oil well drilled within 200 feet of your dwelling house can easily be named. Lynch, under the agreement, was restricted from having a well within the reservation, as was also Burford. He reserved no such rights.

We allowed some evidence to go in to show the situation of the parties with respect to the lease, and the nature of the subject-matter, and the location of the various wells, but there is no latent ambiguity in the agreement, or evidence of fraud or mistake in making it; hence any parol evidence that was admitted to vary the lease is ruled out, and not considered by the court, the written contract being the agreement between the parties.

Both from reason and authority we are of the opinion that J. R. Burford, the defendant, has no legal right to drill within the reservation, and that a court of equity has author-

ity to enjoin him from so doing; hence the injunction heretofore granted is continued.

The court subsequently filed the following opinion:

September 23, 1901, it was agreed upon the hearing that all the testimony taken in the application to continue the injunction should be considered the same as if taken in this proceeding.

Additional testimony was taken on part of the defendant for the purpose of showing that Geo. W. Lynch waived his notice of June 17, 1901, and that by his acts and declarations since the giving of the notice, has estopped himself.

The testimony relied upon was loose conversations, made with drillers and rig builders, not in the presence of the plaintiff, or communicated to him, nor is it shown that the plaintiff had any knowledge of these alleged acts or declarations or in any manner acted upon them to his detriment, or that these rig builders or well drillers were his agents in any way authorized to receive notice or waive anything. The plaintiff denies these conversations, and they are too indefinite to cause us to believe that he intended to waive his written notice of June 17, 1901.

It is true that he did, for a few minutes, work upon the rig. But this was at the solicitation of the rig builders, with whom he was upon friendly terms, as a matter of accommodation to them. It would be a harsh rule indeed to say that a party called in by his friend to give him a lift in an emergency, would by that friendly act lose his rights under his written contract.

After listening to the able argument of the learned counsel for the defendant, we see no reason for changing the conclusions heretofore reached.

And now, September 23, 1901, the opinion filed August 12, 1901, is adopted as the opinion in this hearing and the injunction heretofore granted is made perpetual.

M. F. LEASON and CALVIN RAYBURN, for appellant.

JAMES H. MCCAIN and W. J. CHRISTY, for appellee.

PER CURIAM, November 8, 1901:

The decree in this case is affirmed on the clear and concise opinion of the learned judge of the court below.

F. W. COUCH ET AL. v. J. WELSH ET AL.

(24 Utah 36; 66 Pac. 600. Supreme Court. Nov. 13, 1901.)

The addition of an optional right of purchase to the ordinary terms of a mining lease does not make the agreement a contract of sale but a lease with the usual incidents of a lease.

Lease silent, presumption of right of removal. The lessees in a mining lease may remove buildings and railroad tracks placed on the premises by them, where such removal causes no material injury to the freehold, and the lease is silent as to the right of removal.

The law of fixtures is in derogation of the common law, which made part of the realty everything attached to the freehold.

¹Fixtures defined. Buildings and Track. Whatever is attached for purposes of trade or manufacture—which is removable without material injury to the soil—the removal of which is not contrary to usage and which when removed resumes its character as personalty, is the tenants fixtures. Buildings and track come within this definition.

Sufficiency of motion for non-suit. Where the attention of the court is called to the fact that the lease in evidence gives the landlord no right to the fixtures the motion for non-suit is sufficiently specific in stating the grounds thereof, in a suit against the tenant for removal of such fixtures.

Directing verdict for defendant instead of allowing the non-suit moved for is not commendable practice, but is harmless error where the plaintiff affirmatively shows that he has no case.

Appeal from District Court, Seventh District; JACOB JOHNSON, Judge.

¹The timbers placed in the mine may by special covenant to that effect become trade fixtures. *Mass. Nat. Bank v. Shinn*, 46 N. Y. Sup. 329.

On sale of a quarry tools such as can be used anywhere do not pass as fixtures: Otherwise as to tools useful only to the premises. *Williams' Appeal*, (Pa.) 16 Atl. 810.

Engine and boiler are part of the claim and if claim exempt from tax the fixtures are exempt. *Mammoth M. Co. v. Juab County*, 10 Utah 232; 37 Pac. 348.

Intention determines the question. On forfeiture landlord does not take fixtures. *Wick v. Bredin*, 189 Pa. 83; 42 Atl. 17.

Action by F. W. Couch and others against J. Welsh and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

FRICK & EDWARDS, for appellants.

GEO. L. NYE, for respondents.

BARTCH, J. This action was brought to recover damages for the removal by the respondents of certain improvements from certain mining claims. From the record it appears that on May 5, 1899, the appellants, who were the owners of the mining claims, executed a bond and lease to Ernest G. Miller and Peter McCourt, who then assigned the same to the respondent Huntsman Copper Mining Company. The contract thus assigned contained a covenant granting to the lessees the exclusive right to purchase the mining claims at a stipulated price, and also covenants obligating the lessees to perform certain work upon the claims to improve the same, with the right to mine and sell the ore, and to pay to the lessors certain amounts as royalty, all of which amounts so paid, if any, to apply as part payment of the purchase price in the event of the election by the lessees to purchase the claims, and of their compliance with the conditions of the bond and lease. The contract also provided for forfeitures of all the rights of the lessees, together with all moneys, if any, paid as part of the purchase price, in case of a failure to comply with the conditions of the agreement. After the

A rope hauling system is not an improvement; is separate from the lease. *Beech Grove Co. v. Mitchell*, 193 Pa. 112; 44 Atl. 245.

Lien reserved in lease is not binding against creditors. Where lease in terms makes machinery personalty the fixing to the realty does not alter its status. *Lake Superior Co. v. McCann*, 86 Mich. 106; 48 N. W. 692.

Casings of oil well are fixtures. *Shellar v. Shivers*, 18 M. R. 260. See *Cook v. Enright* and notes, 21 M. R. 496.

execution and assignment of the bond and lease the respondent company went into possession of the property, and, among other things, erected thereon a bunk house and boarding house, and also constructed a track of iron or steel rails in the tunnel, all of which were used in operating the mine. These buildings and track the respondents, while yet in possession, removed from the claims; and thereafter the lessors declared a forfeiture, claiming a failure or refusal on the part of the lessees to carry out the provisions of the agreement. At the trial, after the plaintiffs rested their case, the court, upon motion of the defendants, granted a nonsuit, and at the same time directed the jury to return a verdict, "No cause of action," in favor of the defendants. Thereupon judgment was entered accordingly, and this appeal prosecuted.

The decisive question presented is whether the respondents had the right, under the contract, to remove the buildings and track during the term, and while in possession of the mining claims. It is insisted by the appellants, as appears, that the bond and lease constituted simply a contract of purchase, that the relation of landlord and tenant did not exist, and that the buildings and track in dispute were fixtures of a permanent character, and formed a part of the realty. In neither of these propositions are we able to concur. The contract contains essential characteristics of a lease. On its face it appears that the lessors were "desirous of leasing" as well as selling the property. In the agreement they "grant, lease, and demise" the mining claims, fix the term of the lease, and provide for work to be performed, which is to be "not less than ninety shifts" each month "during the term of the lease." Rent is reserved by way of royalty, and the manner of its payment stipulated. Forfeiture and surrender of possession are provided for in the event of a failure on the part of the lessees to perform any of the covenants of the lease to be performed by them. These are elements of a

lease. In fact, an examination of the instrument shows that the evident design of the lessors was to lease the mining claims and grant to the lessees the privilege to purchase them, and the mere fact that the agreement also contains a covenant granting the "privilege of purchasing" the demised premises does not destroy its character as a lease. Nor is such a covenant inimical to the existence of the relation of landlord and tenant between the parties prior to the exercise of the privilege. 18 Am. & Eng. Enc. Law (2d Ed.) 169; *Clifford v. Gressinger*, 96 Ga. 789, 22 S. E. 399; *Nobles v. McCarty*, 61 Miss. 456; *Hartwell v. Black*, 48 Ill. 301; *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983; *Crinkley v. Egerton*, 113 N. C. 444, 18 S. E. 669; *Holbrook v. Chamberlin*, 116 Mass. 155, 77 Am. Rep. 146. Nor does the fact that the contract provides for the payment of royalty, instead of rent in money, change the character of the instrument, or prevent the creation of the relation of landlord and tenant. Rent may be made payable otherwise than in money. 2 Bl. Comm. 41.

We are of the opinion that the contract in this case must be regarded as a lease, and that the relation of landlord and tenant existed between the parties to this controversy. Having come to this conclusion the question is, was the removal of the fixtures in dispute by the lessees lawful? The contract is silent as to such removal, and the proof fails to show any other agreement relating to the subject. Doubtless, in general, under the rule of the common law as it prevailed in England, any structures once annexed to the freehold became a part of it, and could not afterwards be removed, except by him who was entitled to the inheritance. This rule, however, although never without exceptions, has been greatly relaxed by modern decisions, especially as between landlord and tenant, in favor of the latter. And this would seem to be in consonance with equity and justice, since tenants usually pay adequate rent for the premises, and should there-

fore be permitted to remove during the term fixtures which they have erected at their own expense for their own convenience and use, when this can be done without material injury to the freehold, and when such removal was within the intention of the tenant at the time of the construction of the fixtures. "In modern times," says Chancellor Kent, "for the encouragement of trade and manufactures, and as between landlord and tenant, many things are now treated as personal property which seem, in a very considerable degree, to be attached to the freehold. The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule, instead of being an exception. The general rule, which appears to be the result of the cases, is that things which the tenant has affixed to the freehold for the purpose of trade or manufactures may be removed, when the removal is not contrary to any prevailing usage, or does not cause any material injury to the estate, and which can be removed without losing their essential character or value as personal chattels. The character of the property, whether personal or real, in respect to fixtures, is governed very much by the intention of the owner, and the purpose to which the erection was to be applied." 2 Kent, Comm. 343; 13 Am. & Eng. Enc. Law (2d Ed.) 639; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374; *Wall v. Hinds*, 4 Gray 256, 64 Am. Dec. 64; *Bircher v. Parker*, 40 Mo. 118; *Reynolds v. Shuler*, 5 Cow. 323; *Dubois v. Kelly*, 10 Barb. 496; *Kelty v. Austin*, 46 Ill. 156, 92 Am. Dec. 243; *Whiting v. Brastow*, 4 Pick. 310; *Hayes v. Mining Co.* 2 Colo. 273; *Heffner v. Lewis*, 73 Pa. 302; *Bartlett v. Hariland*, 92 Mich. 552, 52 N. W. 1008. Upon examination of the authorities it will be seen that the law regards with peculiar favor the rights of tenants as to the removal of trade

fixtures annexed by them to the freehold at their own expense; and, applying the principles which govern such cases to the case at bar, we have no hesitancy in holding that under the contract herein the lessees had the right to remove the buildings and track, there being no showing that such removal caused any material injury to the realty. Under such circumstances as are herein disclosed, such fixtures must be regarded as personalty.

The appellants also insist that the court erred in granting a judgment of nonsuit at the close of the plaintiffs' testimony, claiming that the motion therefor was too indefinite. The motion was based upon the ground, among other things, that the proof showed no contract which required the defendants to leave the improvements upon the premises. As the contract hereinbefore considered was the only one which had been introduced in evidence, and the only one under which the lessees held possession of and operated the mine, and since under that contract the lessees had the right to remove the improvements in question, we think the motion was sufficiently specific. It called the attention of the court to the fact that the plaintiffs had introduced no proof showing any liability on the part of the defendants. The motion was therefore sufficient to warrant the court in granting the nonsuit. Nor did the court, under the circumstances disclosed, commit fatal error, as claimed by counsel for the appellants, in directing a verdict for defendants at the same time of sustaining the motion for a nonsuit. The direction of such a verdict was nothing more than the determination of the case by the court on the same grounds which called for a judgment of nonsuit, and, under the circumstances, no prejudice resulted to the appellants. We do not, however, wish to be understood as sanctioning such practice. We simply hold that in this case it was harmless and not prejudicial error. An instruction for such a verdict, given at the close of plaintiff's case upon the ground of failure of proof, is in effect a

nonsuit. 6 Enc. Pl. & Prac. 694; *Gerding v. Haskin*, 141 N. Y. 514, 36 N. E. 601; *McKay v. Railway Co.* 13 Mont. 15, 31 Pac. 999; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *Harris v. Woody*, 9 Mo. 113-116; *Appleby v. Insurance Co.* 54 N. Y. 253.

We find no reversible error in the record.

The judgment is affirmed, with costs.

THE BUNKER HILL MINING CO. v. FRANCIS J. P. PAS-
COE, SR.

(24 Utah 60; 66 Pac. 574. Supreme Court. Nov. 14, 1901.)

The lessee of a mining claim cannot contest his lessor's title or take advantage of the fact that the claim is void for want of a valid discovery shaft.

In an equity case the Supreme Court will look into the evidence to determine the correctness of the decree.

Appeal from District Court, Salt Lake County; A. N. CHERRY, Judge.

Action by the Bunker Hill Mining Company against

¹*Lowry v. Silver City Co.* 179 U. S. 196; 21 M. R. 113. *McCarthy v. Speed*, 20 M. R. 124.

Grantor in deed of mining claims estopped from denying that he was in possession or that the claims had been located. *Belcher Co. v. Deferrari*, 62 Cal. 160.

Grantor of mining claim cannot assert that he had no valid location. *Blake v. Thorne*, 2 Ariz. 347; 16 Pac. 270.

It is excuse for non-performance that plaintiff was prevented by defendant's own act. Contract of sale enforced concerning plaintiff's claim overlapped by defendant's claim, holding that the contract was to cover whatever plaintiff owned. *Griffin v. American Co.*, 123 Fed. 283.

Where the real owner allows another to make a sale of mineral rights and accepts part or all of the purchase money he is estopped to assert his title. *Manning v. Kansas Co.* 181 Mo. 359; 81 S. W. 140.

One who sells mineral rights while holding sheriff's certificate of sale is estopped to assert that he had no title to pass. *Glendenning v. Superior Oil Co.*, — Ind. App. —; 70 N. E. 976.

Where defendant was sued as a naked trespasser for removing ore plaintiff can not plead that defendant was estopped to claim the ore under a contract between them. *Empire Co. v. Tombstone Co.* 131 Fed. 339.

A co-tenant who attested a deed purporting to convey the entire claim is not estopped to assert his co-ownership, he not knowing that the deed purported to convey the entire estate. *Faubel v. McFarland*, 144 Cal. 717; 78 Pac. 261.

Francis J. P. Pascoe, Sr. From a judgment for defendant, plaintiff appeals. Affirmed.

PIERCE, CRITCHLOW & BARRETTE, for appellant.

BROWN & HENDERSON and J. M. THOMAS, for respondent.

PER CURIAM. This action was brought by the appellant herein to determine an adverse claim to the Ada lode mining claim, for which the respondent is seeking to obtain a patent in the United States land office. It appears from the record that on April 15, 1875, one Bynum Lane located the Chief mining claim, which runs north and south, and duly filed his location notice, and thereafter the respondent continued to do work upon it, and since its location it has been a subsisting claim. On April 20, 1875, Bynum Lane, the locator and owner of the Chief, located the Ada mining claim. The validity of this claim is now in dispute. The Ada is located across the Chief. The discovery monuments of the Ada and of the Chief were where the vein in the Chief and the vein in the Ada cross. They were close together—within about 10 feet of each other. The Chief discovery was at a “blow-out” where the Ada discovery was, and both were made on the same mineral, but within the boundary lines of the Chief. Work has ever since been done on the Ada by the respondent, but all of it has been done within the lines of the Chief. The respondent is the grantee and owner of the Ada as well as of the Chief. The Bunker Hill claim was located by J. C. Reynolds February 28, 1885, and includes within its lines a part of the Ada claim, as well as part of the Chief, and was afterwards conveyed to the appellant, who claims it as a valid claim, and that it is entitled to the area in controversy because the evidence shows that the Ada claim was not at the time of its location, and never has been, a valid or subsisting claim, for the reason that the only discovery of

mineral made within its boundaries was at the discovery point, which was placed substantially at the discovery point of the Chief claim, which has since been a valid and subsisting claim. The district court found the issues in favor of the defendant, and the plaintiff appeals to this court.

So far as we are able to determine from the pleadings and the evidence, it appears that the plaintiff occupied and worked the Ada claim under a lease from the owner, paying a royalty therefor, at and prior to the commencement of these proceedings, and, as a further consideration for said lease, agreed to procure a patent for said Ada claim in defendant's name at the expense of plaintiff, and to complete said patent proceedings at the earliest date, and was also to do work thereon. The discovery point of the Ada was also covered by the plaintiff's location. Under such circumstances, we hold that the plaintiff is estopped from denying the right of the defendant to the ground covered by the lease. This being an equity case, the court will look into the evidence for the purpose of determining the correctness of the decree. *Mining Co. v. Lowry*, 19 Utah 334, 57 Pac. 11; *Eustis v. Bolles*, 150 U. S. 361.

The judgment of the district court is affirmed, with costs.

CORNELIUS CROWLEY V. WILLIAM R. WALTON ET AL.

(23 Rhode Island 331; 50 Atl. 385. Supreme Court. Nov. 15, 1901.)

Enforcement of personal liability beyond the state. Subscribers held though stock not issued. Money raised but mine not purchased. An option was held on a mine in Montana for \$30,000. Fifty-seven thousand dollars in stock was subscribed for and the \$30,000 given to a director to be paid to the owner of the mine, but the purchase was never consummated and the stock was not issued: Held that the subscribers to the stock had never paid for the same and that they were liable to a judgment creditor of the company under the Montana statute.

Bill to enforce stockholders' liability for unpaid stock by Cornelius Crowley against William R. Walton and others. Decree for complainant.

STINESS, C. J. The complainant is a judgment creditor of the Providence & Montana Mining & Reduction Company, a corporation under the laws of Montana. The respondents, Walton, Kittredge, and Kendrick, are stockholders in the company; but they have not paid their stock subscriptions in full, and the complainant brings this bill to enforce their liability for the debt to the extent of their unpaid stock.

The respondents claim exemption under Civ. Code Mont. 1895; § 410, which provides that "the directors of a corpora-

¹Stock of a non-resident corporation cannot be garnished in another state although doing business there. *Ireland v. Globe Co.* 19 R. I. 180; 32 Atl. 921.

See personal liability notes to *Kelly v. Clark*, 19 M. R. 431.

A stockholder who has assented to increasing the assessment is estopped to have the validity of sale for foreclosure of company's lien on like subsequent assessments. *Boll v. Camp*, 118 Ia. 516; 92 N. W. 703.

A contract with a company for its stock providing it shall be held five years before issue, is valid. *Williams v. Ashurst Co.* — Cal. —; 78 Pac. 28.

tion may purchase mines and other property for its business and issue stock to the amount of the value thereof in payment therefor and the stock so issued shall be declared and taken to be full paid stock and not liable to any further call, neither shall the holders thereof be liable for any further payments under the provisions of section 470 of the Code: provided, that on mines any arbitrary value may be fixed and such value shall, regardless of the actual value, be deemed the value thereof, so as to make the stock issued in payment therefor, at such arbitrary value, full paid as above defined."

The testimony shows that certain of the respondents held an option for the purchase of mining land in Montana, for which, fully equipped, they were to pay \$30,000, and something more than this sum was paid in. The mine and equipment so to be purchased were to be turned over to the company at the price of \$60,000 in full payment of the amount of capital stock subscribed for, which was \$57,000. It appears in the testimony that this was a fair, and not a fictitious, valuation. Had the property been so transferred, possibly the respondents would have been exempted from further liability, under the laws of Montana. But the statute in question requires a purchase of mines by the directors of the corporation. There is no evidence in the case of any action by the directors, as such, but simply an agreement or understanding between the promoters of the company and the subscribers to the stock of what was to be done. This falls far short of the requirements of the statute, but, had the transfer of the property to the corporation been made, it might have been regarded as a corporate act. The fatal defect in the respondents' testimony is the omission to show that any property was in fact purchased or received by the corporation. From their brief we assume that the transaction was not consummated, because they claim that as the

stockholders had paid in all that they had agreed to pay, and the corporation only is delinquent, in an equitable proceeding no liability should be visited upon them because of the default of the corporation. They say: "The liability against the stockholders in a court of equity should exist only in the event that such liability would have existed had the transaction been fully consummated."

The respondents rely for their protection on section 410 of the Montana Code, which exempts stockholders only in case of an actual purchase of mines and the issue of stock therefor. In this case there has been no purchase and no issue of stock. The respondents are not within the terms of the statute. The failure to issue the stock might have been unimportant if the respondents had shown that they were entitled to it. But this they have not shown. They let one of the promoters, who was also named in the certificate of incorporation as a director, have the money. This is not equivalent to the purchase of a mine. So far as appears, they trusted an agent who may have defrauded them. If this is so, it is their misfortune, and not that of a creditor who trusted the corporation. The only facts established in the case are that there was a corporation, that the respondents were stockholders, and that they have not paid their stock subscriptions in full. They are thus clearly within the terms of section 470 of the Civil Code of Montana, which is: "The stockholders of any corporation shall be severally and individually liable to the creditors of the corporation in which they are stockholders, to the amount of the unpaid stock held by them respectively, for all acts and contracts made by such corporation until the whole amount of capital stock subscribed for shall have been paid in."

The complainant's right is settled by his judgment. Nothing is shown to impeach it. It was suggested in argument that a part of the plaintiff's claim accrued before the date of

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incorporation, but, if this were a matter which we could con- sider, an inspection of the judgment indicates that due allow- ance was made.
In view of these facts, we see no reason to discuss other questions argued at the hearing.
The complainant is entitled to a decree.

P. J. McCARTHY and GEORGE B. BARROWS, for complain-
ant.

EDWARDS and ANGELL, for respondents.

COSMOS EXPLORATION CO. V. GRAY EAGLE OIL CO. ET AL.

PACIFIC LAND & IMPROVEMENT CO. V. ELWOOD OIL CO.
ET AL.

(112 Federal 4. Circuit Court of Appeals, Ninth Circuit. November
15, 1901.)

Contest pending in land office. The federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties in land the title to which remains in the United States, and in regard to which a contest between the parties is pending in the land department.

No equity case where defendant in possession. A federal court of equity is without jurisdiction of a suit to determine the title or right of possession to lands brought by one who is out of possession against a claimant in possession.

Allegations as to defendant's mining an admission of his possession. Averments in a bill that defendant has drilled oil wells on the land, and is taking oil therefrom, against which an injunction is prayed, are, in effect, averments that defendant is in possession, and render the bill subject to demurrer, as in purpose and effect an ejectment bill.

Exchange under Forest Reservation Act. Land subject to selection. Public lands are "vacant and open to settlement," and therefore subject to selection in lieu of relinquished forest reserve lands covered by patent, under Act June 4, 1897 (30 Stat. 36), only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character. It devolves on the person making the selection to establish such facts by proof, so far as they are not shown by the records; and under the regulations of the land department adopted pursuant to such act, which have the force of law, and which require all applications thereunder to be "forwarded by the local officers to the commissioner of the general land office for consideration, together with report as to status of the tract applied for," the equitable title to such tract does not vest in the applicant until the approval of the selection by the department, and until such approval the selection is subject to be defeated by proof either that the land is in fact mineral in character, and therefore not "open to settlement," or that it was not vacant at the time the selection was made.

¹*Basin M. Co. v. White*, 19 M. R. 690.

Occupancy by explorer for minerals. Land was not "vacant and open to settlement," and subject to selection under such act, where at the time of the application it was in the actual occupancy of others engaged in exploring it for oil, under oil placer mining locations previously made by them, although such locations did not appear by the records of the local land office, and although they were not valid as against the United States, because there had been no previous discovery of oil on the land, where the locators prosecuted the work of exploration with due diligence, and with the result of discovering oil in paying quantities before the selection by the applicant under the forest reserve act had been approved by the land department.

Prospector's possession valid. Until by such approval an applicant is vested with the equitable title to the land, it remains subject to exploration for minerals under the mining laws; and, while lawfully occupied by one engaged in making such exploration, it is not "vacant," within the meaning of the act; nor is it open to settlement where, as the result of such exploration, its mineral character is established, while the title, both legal and equitable remains in the United States.

Gilbert, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of California.

The bill of complaint in the Pacific Land & Improvement Company against the Elwood Oil Company alleges, in substance: That the selection by complainant's predecessor in interest, one J. R. Johnston, on the 23d day of December, 1899, under the act of congress of June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending

²*Olive Co. v. Olmstead*, 20 M. R. 700. *Erhardt v. Boaro*, 15 M. R. 472.

Where an act of congress provided that no patent should issue to the N. P. Ry. until certain commissioners had reported the land to be non-mineral, a patent issued after their report is conclusive that the land is non-mineral, in the absence of fraud or mistake. *Trappaagen v. Kirk*, — Mont. —; 77 Pac. 58.

The validity of the reservation in such patent of "All minerals contained in the soil" is doubtful, and if valid, there being no surface reservation, a mining location could not be made on the same. *Id.*

June 30, 1898, and for other purposes," of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 4 in township 29 S., range 38 E., M. D. B. & M., containing 80 acres of land, and no more, in lieu of a tract of 80 acres of non-mineral land included within the limits of a public forest reservation, for which the United States has issued to him a patent, and which the said Johnston on December 20, 1899, under and pursuant to the provisions of said act of June 4, 1897, relinquished to the United States by deed of conveyance recorded in the office of the county recorder of the county in which said tract is situated, which Johnston delivered at the time of his lieu selection, on the 23d day of December, 1899, to the register and receiver of the land office at Visalia, Cal., within which the selected land is situate, which deed, indorsed as recorded as aforesaid, the said Johnston at the said time filed in said local land office, together with a full and correct abstract of his title to the relinquished tract, duly certified as such by the county recorder of the county in which the tract is situated, showing him to be the owner thereof in fee, free from any incumbrance, at the time of such relinquishment, together with his non-mineral affidavit, and together with his selection of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 4 in lieu of the tract relinquished. That on the said 23d day of December, 1899, said register and receiver duly accepted and filed said deed, abstract of title, non-mineral affidavit, and selection of the said Johnston, and duly entered such selection upon the official records of his office. That the register did then and there certify that the tract so selected by the said Johnston was free from conflict; that there was no adverse filing, entry, or claim thereto; that the selected lands were, at the time of selection, unappropriated, vacant public lands of the United States, open to settlement, and returned by the surveyor general as agricultural in character; that such lands, when selected, did not contain any known minerals or known petroleum or known mineral oils; that no mineral, petroleum, or known mineral oil, or mineral substance of any kind, had ever been discovered within the limits thereof. That on April 11, 1900, Johnston conveyed the tract so selected, and all his right, title, and interest therein, to the complainant, who has ever since been the owner thereof. That the defendants based their claim to the tract in controversy upon a certain pretended placer mining location covering the S. W. $\frac{1}{4}$ of section 4, alleged to have been made on June 11, 1899, under the mining laws of the United States, by eight named persons, whose interests the defendants claimed to have acquired by mesne conveyances. That said location was void for the reason that no discovery of oil or other mineral was made within its limits until after the selection by said Johnston as aforesaid. That, after the lands in controversy were selected by said Johnston, certain of the defend-

ants filed in the local land office at Visalia a written, verified protest against such selection, wherein it was alleged that said lands were not subject to selection under said act, for the reason that the same was mineral land, and was included within the boundaries of a valid placer location. That said protest prayed that the commissioner of the general land office order a hearing to determine the mineral character of said lands, and that the selection thereof made by said Johnston be rejected. That said protest is pending before the commissioner of the general land office. That the same is insufficient to justify a hearing being ordered by the land department to determine the character of said land, or to change its classification as fixed by the report of the surveyor general, for the reason that the same does not show that there was any known mine or any known salines or any known or existing petroleum wells or known petroleum deposits on the selected land at the time of its selection, showing the same to be more valuable for mining than agricultural or other purposes. That notwithstanding Johnston acquired the complete equitable title to the land in controversy by his selection thereof, and notwithstanding that he was entitled to the complete and uninterrupted enjoyment and possession of the same, the defendants, against the will of the said Johnston, knowing that said land had been selected by him under the act of congress aforesaid, and knowing his rights in the premises, without any right in themselves, or any of them, did, on or about the 6th day of January, 1900, by themselves and their employes, without right, and wrongfully and unlawfully, and without the knowledge or consent of said Johnston, and in disregard of his rights, enter upon and became possessed of the lands in question, and erected a derrick and other machinery thereon, and proceeded to excavate the soil thereof and to bore a well therein, seeking for petroleum oil therein, for the purpose of taking the same, if found, to their own use, and removing the same. That afterward, about the last of January, 1900, the defendants found in said well petroleum oil in profitable quantities, and that they are engaged in wrongfully and unlawfully pumping large quantities of oil from said well, and removing the same from said lands, and selling and disposing of and marketing the same, and appropriating the proceeds thereof to their own use, and will continue to do so, to the great waste and irreparable injury of said premises, unless restrained therefrom by order of injunction, and that, unless restrained by order of the court, the defendant will bore other wells upon said premises, and, if successful in obtaining petroleum therein, will take such petroleum therefrom and market the same for their own use and benefit, and that complainant has no complete or adequate legal remedy against the wrongs complained of. The prayer of the bill is for a temporary injunction, restraining the

defendants from further boring of wells upon the premises and the further removing of oil therefrom, and that upon the final hearing such injunction be made perpetual. It also asks a decree adjudging that complainant has the full, complete, and equitable title to the premises; that the adverse claims of the defendants thereto are wholly without right and unfounded; that a receiver be appointed to take possession of the property, and preserve the same and the products thereof until the further order of the court; and for such other relief as may be proper in the premises. The act of congress of June 4, 1897, before referred to, contains, among other things, the following provisions: "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. 36. To the bill of complaint the defendants interposed a demurrer upon the grounds: "(1) That enough does not appear upon the face of the bill to show this court's jurisdiction of the subject-matter of the suit; (2) that complainant has not, by its said bill, stated any cause entitling it to any relief against the defendants, or either of them; (3) that the said bill is altogether multifarious; (4) that it appeareth by the plaintiff's own showing, by the said bill, that it is not entitled to the relief prayed by the bill against these defendants, or either or of any of them, nor to any relief against these defendants, or either of them or any of them,"—and prays the judgment of the court whether they, or either of them, should be compelled to make any answer to the said bill. (C. C.) 104 Fed. 20.

SHIRLEY C. WARD, JEFFERSON CHANDLER, and J. W. SWANWICK (JOHN H. MITCHELL, JOHN M. THURSTON, and T. C. VAN NESS, of counsel), for appellants.

FRANK H. SHORT, J. S. CHAPMAN, and C. LINKENBACH (GEORGE W. BAKER, of counsel), for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after stating the foregoing facts, delivered the opinion of the court.

The legal questions involved in these cases on appeal are identical. The facts are substantially the same. There is no difference between them, so far as the demurrer to the bill is concerned, except in two particulars. The demurrer in the Pacific Land & Improvement case makes as one of its objections to the bill that it is multifarious. No such objection is urged against the bill in the Cosmos Exploration case. In the Pacific Land & Improvement case there was no amended application made in the land office. It stands upon the single application made on the 23d day of December, 1899. Following the course adopted by appellant's counsel, we shall confine the discussion to the Pacific Land & Improvement case, because, as was said by the court below, "these cases were heard together, and may be so considered and determined, as the principal questions involved are common to them both."

Upon the filing of the bill the court made an order requiring defendants to show cause, if any they had, why a preliminary injunction should not be granted as prayed for. The defendants appeared and interposed a demurrer to the bill. Upon the hearing of the rule to show cause a large number of affidavits were presented by both sides. The defendants in the meantime had answered the bill, and their answers were used as affidavits upon the hearing of the rule to show cause. The demurrer was argued at the same time and submitted. Thereafter the court rendered its decision and decree, on September 24, 1900, "that the application for a receiver and for an injunction be, and the same hereby is, denied; that the demurrer be, and hereby is, sustained; and that the bill of complaint be dismissed at complainant's costs,"—and on September 26th entered its regular decree dismissing the bill. This appeal is taken only from the order and decree sustaining the demurrer and dismissing the bill.

The discussion of these questions will be confined to the facts alleged in the bill.

Did the court err in sustaining the demurrer? Did it err in dismissing the bill? Does it appear upon the face of the bill that the circuit court had jurisdiction of the parties and the subject-matter of the suit? The contentions of the respective parties are clearly outlined by the several allegations contained in the bill of complaint, and the first and most important question that arises herein is whether or not appellant has by such averments "stated itself out of court." This is the vital point upon which the merits of this case, in so far as the demurrer is concerned, hinges.

The demurrer, interposed by defendants, questions the jurisdiction of the circuit court. We are of opinion that the federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land to which the title remains in the government of the United States, in regard to which, as shown by the averments in the present bill, a contest between the parties is pending in the land department of the government. In *Savage v. Worsham* (C. C.) 104 Fed. 18, Judge Ross said:

"It would seem from the bill that the title to the land in question is still in the United States, and that the contest between complainant and respondent in respect to it is yet pending in the land department. If so, it is clear that the suit cannot be maintained. 'After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds may be enforced, but not before.' *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800."

Humbird v. Avery (C. C.) 110 Fed. 465, 471.

An action of ejectment cannot be maintained in the courts of the United States on a merely equitable title. *Frost v. Spitley*, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 30 L. Ed.

1010; *Carter v. Ruddy*, 166 U. S. 493, 496, 17 Sup. Ct. 640, 41 L. Ed. 1090, and authorities there cited.

The averments in the bill, by whatever name it may be called, are susceptible of the construction that the defendants are in possession of the land in controversy. "It is true," as was said by Wellborn, J., in *Gas Co. v. Miller* (C. C.) 96 Fed. 12, 23, "that the bill does not, in terms, allege that the defendants are in possession, but the acts charged against the defendants are such as necessarily imply actual possession or occupancy of the land." While such a bill might be maintained under the state law, it is not cognizable by a federal court of equity, the remedy being at law.

In *Erskine v. Oil Co.* (C. C.) 80 Fed. 583, 585, Buffington, J., in discussing this question, said:

"While the bill does not, in words, pray to acquire possession of the wells, yet in substance and effect that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil, and these acts are, where oil and gas are concerned, the essential attributes of possession. The supreme court of Pennsylvania, in the case of *Gas Co. v. De Witt*, 130 Pa. 250, 18 Atl. 725, 5 L. R. A. 733, after discussing the peculiar character of gas and oil and their production, say: 'The one who controls the gas [the subject-matter of the case before it] has it in his grasp, so to speak,—is the one who has possession in the legal as well as in the ordinary sense of the word.' A bill, then, which in substance would deprive one in possession of everything which constitutes possession, whatever it is in name, is in fact one to divest possession, or what is known as an 'ejectment bill.' * * * In the federal courts the line between law and equity, and consequently between legal and equitable rights and remedies, has been sharply defined, and strictly observed. The provision of the constitution vesting judicial powers 'in cases in law and equity * * * between citizens of different states' recognizes the distinction. A constitutional amendment insures the right of trial by jury 'in suits at common law when the value in controversy shall exceed twenty dollars,' and the sixteenth section of the judiciary act of 1789 provides 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law.' And to such length have these provisions been extended that it has been held (*Allen v. Car Co.* 139 U. S. 662, 11 Sup. Ct. 683, 35 L. Ed. 305): 'If

the court, in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel.' And rightly so, for we are here dealing with the constitutional right of the citizen, and, as was said by Mr. Justice Campbell in *Hipp v. Babin*, 19 How. 278, 15 L. Ed. 635, 'whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' * * * After careful consideration, we are of opinion complainants' title is wholly a legal one, that ample remedy exists at law, that there are no special facts or circumstances in this case calling for the exercise of equitable jurisdiction, and that the bill is an ejectment one. With a disposition on our part to, if possible, retain jurisdiction to dispose of the case by construing the will, and end the controversy between the parties, we are unable to do so. The cases of *Hipp v. Babin*, 19 How. 278; *Whitehead v. Shattuck*, 138 U. S. 146, and others that might be referred to, block the way to a federal court assuming jurisdiction of what is, in substance and real purpose, an ejectment bill."

In *Whitehead v. Shattuck*, 138 U. S. 146, the bill of complaint, among other things, alleged that, notwithstanding complainant's ownership of the property and his right to its immediate possession and enjoyment, the defendants claimed title to it, and were in its possession, holding the same openly and adversely to him; that their claim of title was without foundation in law or at equity; and that it was made in fraud of the rights of the plaintiff. To this bill the defendants demurred on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy, and adequate remedy at law, by ejectment, to recover the real property described, and that it showed no ground for equitable relief. The demurrer was sustained. In the course of the opinion the court said:

"The Code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in posses-

sion,' implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that state. * * * If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that state cannot control the proceedings in the federal courts, so as to do away with the force of the law of congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury."

The opinion in that case was written by Mr. Justice Field, who also wrote the opinion in *Holland v. Challen*, 110 U. S. 15, relied upon by appellant, and he explains and distinguishes that case from the one under consideration.

In *Black v. Jackson*, 177 U. S. 349, 361, the court, in discussing similar questions, quotes with approval the language of the court in *Lacassagne v. Chapuis*, 144 U. S. 119, 124, as follows:

"The plaintiff was out of possession when he instituted this suit, and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. * * * The plaintiff has a full, adequate, and complete remedy at law, and the case is not one for the jurisdiction of a court of equity."

See, also, *Gordon v. Jackson* (C. C.) 72 Fed. 86; *Randolph v. Allen*, 19 C. C. A. 353, 73 Fed. 23, 30; *Grether v. Wright*, 23 C. C. A. 498, 75 Fed. 742, 748; *Childs v. Carlstein Co.* (C. C.) 76 Fed. 86, 95; *Davidson v. Calkins* (C. C.) 92 Fed. 230, 232, and authorities there cited; *Morrison v. Marker* (C. C.) 93 Fed. 692, 695, and authorities there cited; *Hanley v. Coal Co.* (C. C.) 110 Fed. 62, 69.

We are of opinion that the circuit court had no jurisdiction to try the title to the property, or to adjudge the complainant to be entitled to the possession thereof.

Appellants' counsel claim that the bill was framed upon the theory that the controversy of the parties before the land department turned solely upon a pure question of law, to be finally determined by the court, and did not and does not involve any question of fact over which the land department had or has exclusive jurisdiction. But, in any event, if the court should hold that it had no jurisdiction to try the title between the parties, or to enter a decree for the possession thereof as prayed for in the bill, it nevertheless has jurisdiction and should have entertained the bill in so far as it asked for an injunction to preserve the statu quo pending the determination of the controversy between the parties in the land department. The general disposition of the courts is to retain jurisdiction of any subject where there is any plausible ground of equitable cognizance. (*Waite v. O'Neil* [C. C.] 72 Fed. 348, 356; *Randolph v. Allen*, 19 C. C. A. 353, 73 Fed. 23, 30; *Grether v. Wright*, 23 C. C. A. 498, 75 Fed. 742, 749; *Greeley v. Lowe*, 155 U. S. 58, 75, 15 Sup. Ct. 24, 39 L. Ed. 69), especially where such jurisdiction would not infringe upon the constitutional rights of the parties to a trial by jury.

Does the bill of complaint, from any legal or equitable standpoint, state facts sufficient to show that complainant is entitled to any relief? It will be observed from the allegations contained in the bill that the pleader did not confine himself to a statement of the facts, but interjected therein his construction and conclusion not only as to the facts, and the meaning of the act of congress of June 4, 1897, but also his views in regard to the legal principles applicable thereto. While the rule is well settled that in considering the points raised by a demurrer the facts stated in the bill must be treated as true, it does not by any means follow that the con-

clusions of counsel as to the law must likewise be accepted as correct. It is the duty of the court to determine the principles of law applicable to the facts stated in the bill. The act of June 4, 1897, is the measure of appellant's rights and of its duties. By the averments in its bill of complaint, has it brought itself within the requirements of the law? A person making selections of land under the provisions of the act of congress of June 4, 1897, must relinquish to the government the tract in the forest reservation, and submit satisfactory evidence respecting the title thereto, and must make selection of the tract desired in exchange for the tract of land relinquished, and accompany his selection by proof showing the selected land to be of the condition and character making it subject to selection. These are the essential requirements of the act.

The principal contentions of the respective parties in their briefs and upon the oral argument may be briefly stated as follows: On the part of appellant: (1) That lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the land office records, unless at the date of selection they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes; (2) that defendants' mining locations are void because no discovery of petroleum had been made at the time of the location, nor until after the lands had been selected by appellant's grantor, and that, notwithstanding the mining locations of appellees, the land was vacant and open to settlement at the time it was selected by Johnston; (3) that the equitable title to lands selected in lieu of patented lands relinquished vests at the date of selection, and cannot be impaired by subsequent mineral discoveries in the land. On the part of appellees: (1) That lands are vacant and open to settlement, and therefore subject to selection under said act, only when they are unoccupied by others, are free from

other claim of record, and are nonmineral in character; (2) that lands selected under said act in lieu of relinquished forest reserve lands, covered by patent, remain open to exploration under the mining laws until the approval of the selection by the land department, and if at any time after the selection, and before its approval, the selected land is discovered to contain valuable mineral deposits, its mineral character will be thereby established, and the selection defeated.

In the homestead and pre-emption cases questions have frequently arisen as to the known character of the land at the date of the cash entry, and it has been generally held that if the land was then known to be mineral land, chiefly valuable for its mineral contents, or more valuable for mining than agricultural purposes, it is not subject to entry. If no such facts as to the mineral character of the land are shown to exist, the pre-emptioner or homesteader, if he is possessed of the necessary qualifications and has fully complied with the preemption or homestead laws, as the case may be, at the time of his cash entry, is entitled to the land. The general rule is well settled that the right to a patent, once vested, is treated by the government, in dealing with the public lands, as equivalent to a patent issued, and, when the patent does issue, it relates back to the inception of the right of the patentee. *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *U. S. v. Hughes*, 11 How. 552; *French v. Spencer*, 21 How. 228; *Hughes v. U. S.*, 4 Wall. 232; *Stark v. Starrs*, 6 Wall. 402, 414; *Wirth v. Branson*, 98 U. S. 118, 121; *Simmons v. Wagner*, 101 U. S. 260, 261; *Deffenback v. Hawke*, 115 U. S. 392; *Davis v. Wiebold*, 139 U. S. 507, 528; *Hedrick v. Railroad Co.* 167 U. S. 673, 679. The commissioner of the general land office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of congress, have the force and effect of laws. The regulations of the commissioner relative

to lieu land selections under the act of June 4, 1897 (prescribed June 30, 1897), are in our opinion, reasonable, and evidently were intended and are well calculated to carry into effect the intent and true meaning of the act of congress. They are properly within the limitations of the law for the enforcement of which they were promulgated, and should be complied with. *Anchor v. Howe* (C. C.) 50 Fed. 366; *Iron Co. v. James*, 32 C. C. A. 348, 89 Fed. 811, 814; *Hoover v. Salling* (C. C.) 102 Fed. 716, 720; *Poppe v. Athearn*, 42 Cal. 606, 609; *Chapman v. Quinn*, 56 Cal. 266, 273. We understand it to be virtually admitted that the party making an exchange of land under the forest reserve act, like any other entryman upon the public lands of the United States, only secures a vested interest in the lands which he has selected in exchange for or in lieu of the lands relinquished by him when he lawfully enters upon the same, and in all respects complies with the requirements of the law under which he claims his rights. This general principle is too well settled to require any elaborate discussion. It has been so decided by this court in *Mortgage Co. v. Hopper*, 12 C. C. A. 293, 64 Fed. 553, 555; *Diller v. Hawley*, 26 C. C. A. 514, 81 Fed. 651, 653. The latter case was taken to the supreme court of the United States, and was there affirmed. 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157. As illustrative and decisive of many of the questions discussed by counsel, we quote from *Lumber Co. v. Rust*, 168 U. S. 589, 592, 18 Sup. Ct. 208, 209, 42 L. Ed. 591, 592:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration, and the land is subject to the jurisdiction of the land department of the government. It is true, a patent is not always necessary for the transfer of the legal title. Sometimes an act of congress will pass the fee. *Strother v. Lucas*, 12 Pet. 410, 454, 9 L. Ed. 1137; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *Chouteau v. Eckhart*, 2 How. 344, 372, 11 L. Ed. 293; *Glasgow v. Hortiz*, 1 Black 595, 17 L. Ed. 110; *Langdeau v.*

Hanes, 21 Wall. 521, 22 L. Ed. 606; *Ryan v. Carter*, 93 U. S. 78, 23 L. Ed. 807. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title. Rev. St. § 2449; *Fraser v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141, 29 L. Ed. 311. But, wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent. *Bagnell v. Broderick*, 13 Pet. 436, 450, 10 L. Ed. 235. And while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost. It is, of course, not pretended that, when an equitable title has passed, the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius v. Kessel*, 123 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; *Orchard v. Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. Ed. 737; *Parsons v. Venzke*, 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not in themselves constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' *Miller v. Kerr*, 7 Wheat. 1, 6, 5 L. Ed. 381. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *U. S. v. Stone*, 2 Wall. 525, 535, 17 L. Ed. 765; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *U. S. v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167; *Bicknell v. Comstock*, 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. Ed. 962; *Mining Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid, and a receiver's final certificate issued. *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737, and cases cited in the opinion; *Parsons v. Venzke*, 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360."

See, also, *Knight v. Association*, 142 U. S. 161; *Hawley v. Diller*, 178 U. S. 476.

Referring to the provisions of the act of June 4, 1897, upon which the right of appellant is founded, we find it there stated that the party relinquishing his forest reserve

land "may select in lieu thereof a tract of vacant land open to settlement." He cannot select in lieu thereof any tract of public land that is not vacant nor open to settlement. The bill of complaint alleges a full compliance on behalf of appellants' grantor, Johnston, with all the provisions of the statute, and further alleges that defendants controvert this proposition, and "base their rights in and title to the premises" upon a certain pretended placer mining location, covering the southwest quarter, alleged to have been made upon the 11th day of June, 1899, under the mining laws of the United States, by parties under whom the defendants claim to have acquired title by mesne conveyance, and then alleges that these alleged placer mining locations were and are irregular and void because the same were not based upon any discovery of mineral or oil thereon, and that in fact no discovery of oil was made thereon until after the said land was selected by said Johnston under the act of congress, and that since said land was selected by Johnston the defendants have entered thereupon, bored for and obtained petroleum thereon, and are now engaged in marketing the same therefrom. It will be noticed that these locations were made over six months prior to the date of selection under the forest reserve act by the grantor of appellant. What is the meaning of the words "vacant lands open to settlement," used in the act with reference to the facts as alleged in the bill? The ordinary meaning of the word "vacant," in its general use, is to be empty or unfilled. When applied to an office, it means the condition when it is first created, and not filled by any incumbent, or after the death or removal of an incumbent before his successor is appointed. Vacant lands are such as are absolutely free, unclaimed, and unoccupied. "The word 'vacant,' when applied to lands, means those which have not been appropriated by individuals." *Marshall v. Bompart*, 18 Mo. 84, 87. Under the wise and beneficent policy of the government of the United States, all its public lands were

thrown open to its citizens, and those who had declared their intention to become such, for exploration for the precious minerals and development thereof. Section 2319, Rev. St.:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

The grantors of defendants, at the invitation of the government, and assurance of protection from it, and believing that the lands in question contained oil, lawfully entered thereon and made locations of 20-acre tracts, as they were authorized to do by the laws of the United States, and commenced to search for oil.

Chapter 216, 29 Stat. 526, reads as follows:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: provided, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof."

From the allegations of the bill it appears that at the time of appellants' selection of the lands in question no discovery of any mineral had been made. Appellees could not at that time have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there.

They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it cannot, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time, because it was then occupied by the defendant's grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States. It is true that no valid location of a mining claim can be made, under the mining laws, until the discovery of mineral. Section 2320 of the Revised Statutes expressly provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." It does not, however, follow that, because no mineral was found, the land in question was unoccupied. It is true, as was held in *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93, that the mere possession of a piece of mining ground is only good as against an intruder, but not as against one who subsequently located the same in compliance with the mining laws. The same principle was announced in *Crossman v. Pendery* (C. C.) 8 Fed. 693, but Miller, J., in the course of his opinion, said:

"A prospector on the public mineral domain may protect himself in the possession of his *pedis possessio* while he is searching for mineral. His possession, so held, is good as a possessory title against all the world, except the government of the United States."

The location of a mining claim is but one step toward the acquirement of a title thereto. As a matter of fact, the location is seldom the first act. It is sometimes the last step taken. As was said in *Erwin v. Perego*, 35 C. C. A. 482, 485, 93 Fed. 608, 611:

"The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will

inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. *Jupiter M. Co. v. Bodie M. Co.* (C. C.) 11 Fed. 666, 676; 4 Morr. Min. Rep. 411, 423; *North Noonday M. Co. v. Orient M. Co.* (C. C.) 1 Fed. 522, 531; *Zollars v. Evans* (C. C.) 5 Fed. 172, 175; *Strepey v. Stark* (Colo. Sup.) 5 Pac. 111, 114; *Thompson v. Spray*, 72 Cal. 528, 533, 14 Pac. 182; *Erhardt v. Boaro*, 113 U. S. 527, 536, 5 Sup. Ct. 560, 28 L. Ed. 1113."

But, whatever his rights may be, the fact that the miner is in the actual possession without having made any location at all shows that the land is not "vacant."

Prior to the passage of the acts of congress for the disposition of the mineral lands, it was expressly held that, when a notice was posted and the boundaries marked, possession extended to the entire limits, although the location was not made in the manner prescribed by local rules. *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574. Since the enactment by congress of the laws for the disposition of the public mineral lands the same doctrine has been applied. *Field v. Grey*, 1 Ariz. 404, 25 Pac. 793; *Mining Co. v. Hendry* (N. M.) 50 Pac. 330. The fact that defendants, under their mining locations had not, at the time of Johnston's selection of the land as agricultural, discovered any petroleum,—that being the mineral for which their locations were made,—shows that they had not perfected their locations under the mining laws; that their absolute right to the exclusive possession of the ground covered by their locations, as against the government of the United States, had not accrued to them, and the government might, if it had seen fit so to do, have terminated the license theretofore given to them to occupy the land, and congress might have granted the land to others. But under the act of June 4, 1897, it will be observed that congress did not grant the right under the forest reserve act to select any lands unless they were vacant. It therefore necessarily follows that, if the land was not vacant and open to settlement,

Johnston did not acquire any title to the land in question. He was, in the eye of the law, a trespasser, because so far as that act is concerned the lands were excepted from such selection, and by attempting to make such selection he was a mere intruder, and his grantee is not in a position to question the validity of the defendants' locations. From the averments contained in the bill, we cannot agree with the poetic fancy of the learned counsel for appellant that this land at the time of Johnston's entry "lay under the sunshine of God, just as denuded of possession as it was on the dawn of the primal morning." In *Tarpey v. Madsen*, 178 U. S. 215, 220, the court, in discussing a similar question, with reference to the occupancy of public land by parties whose claims rested on no statute, and upon no other right than the general recognition by the government in its disposition to protect actual settlers, said:

"It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go on the public domain, build cabins, and establish themselves, temporarily, at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and inclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not, in the eye of the law, considered as technically trespassers. No individual can interfere with their occupation or compel them to leave. Their possessory rights are recognized as of value, and made the subjects of barter and sale. *Lamb v. Davenport*, 18 Wall. 307, 21 L. Ed. 759."

In *Shaw v. Kellog*, 170 U. S. 312, 332, the court discussed many questions which are directly applicable to the present case. The facts in relation to the selection of lands were very similar to the act under consideration. The court, in reference to the subject we are now considering, said:

"The grant was made in lieu of certain specific lands claimed by

the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant."

In *Kern Oil Co. v. Clarke*, 30 Land Dec. 550, 555, the secretary of the interior, among other things, said:

"The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected bona fide claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the government, and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise."

The contention of appellant that the act of congress has reference only to vacant land open to settlement which appears upon the books of the land department cannot be sustained. In the brief of appellant, counsel say:

"It is respectfully and confidently submitted that this word 'vacant' has never been held to apply merely to 'unoccupied public lands,' but to all public lands which the records of the land office show are unreserved and unappropriated, whether actually occupied or not. In other words, the term 'vacant lands,' in general land office parlance, from time immemorial, has meant simply this: Those public lands which are unreserved and unappropriated, as shown by the records of the general land office."

Some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented. It would be absurd to say that such lands were vacant and open to settlement because the books of the land

department do not show that they have been settled upon. The possessory rights of the miners have always been recognized by law, although in all such cases the legal title to the land remains in the government.

In *Forbes v. Gracey*, 94 U. S. 762, the court, in relation to the subject we are discussing, in the course of its opinion, said:

"Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims."

Rev. St. §§ 2318-2352.

In *Kern Oil Co. v. Clarke*, *supra*, Secretary Hitchcock, in discussing this subject, said:

"The statute authorizes selection only of 'vacant land open to settlement.' To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records,—that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation,—no showing by the selector in respect thereto need be made, for the reason that the officers of the government can and must take notice of the public records. But as to conditions, the existence or nonexistence of which cannot be determined by anything appearing upon the public records, and as to which the officers of the government must depend entirely upon outside evidence,—that is, whether the selected tract is occupied by others or known to be valuable for minerals,—it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government cannot be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. * * * Obviously, therefore, it could not have been con-

templated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the commissioner of the general land office and the secretary of the interior. Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously or at any time vacant or occupied, and whether at any time known to be valuable for minerals, and, if so, whether stripped of their minerals and worked out, are matters not shown by the land office records."

The contention or appellant would, if its doctrines were to prevail, lead to results which are denounced in *Atherton v. Fowler*, 96 U. S. 513, 516, 24 L. Ed. 732, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands, that the right to make improvements is to be exercised on unimproved land, that the right to erect a dwelling house is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others. No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon. *Cowell v. Lammers* (C. C.) 21 Fed. 200, 202; *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 674, 680; *Hosmer v. Wallace*, 97 U. S. 575, 579; *Trenouth v. San Francisco*, 100 U. S. 251; *Mower v. Fletcher*, 116 U. S. 380, 385, 386; *Haws v. Mining Co.* 160 U. S. 303, 317; *Nickals v. Winn*, 17 Nev. 188, 193, 30 Pac. 435; *McBrown v. Morris*, 59 Cal. 64, 72; *Goodwin v. McCabe*, 75 Cal. 584, 588, 17 Pac. 705; *Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62. The decisions upon this point are not all confined to cases where the entry was forcible, although in such cases the courts did not discuss the question whether the same

principles would apply to cases of an entry upon lands in the actual possession of another without the use of force. In *Quinby v. Conlan*, 104 U. S. 420, 423, the element of force is not shown to have existed, and is not adverted to in the opinion. The court said:

"A settlement cannot be made upon public land already occupied. As against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decisions in *Atherton v. Fowler*, 96 U. S. 513, and *Hosmer v. Wallace*, 97 U. S. 575."

In *Goodwin v. McCabe*, *supra*, the court said:

"If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. * * * The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not."

In *Gird v. California Oil Co.* (C. C.) 60 Fed. 531, 545, this principle is recognized. The court said:

"If Irland was in the actual possession, and working the ground for himself, and Bradfield, Henley, and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because in that event the location would have been made upon ground not vacant and open to location, but upon ground in the actual and adverse occupancy of another."

Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not at the time of such selection "vacant land open to settlement," it is unnecessary to review the many other questions which were elaborately argued by the learned counsel.

It necessarily follows from the views we have expressed that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The court did not, therefore, err in sustaining the demurrer and dismissing the bill.

It is proper to state that, after the preparation of this opinion, appellant was given permission to present to this court the brief filed in its behalf before the secretary of the interior upon its application for a review of its decision in *Kern Oil Co. v. Clarke*, 30 Land Dec. 550, and *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 30 Land Dec. 570, wherein, among other things, the question of the meaning of the words "vacant lands open to settlement," as used in the act of congress of June 4, 1897, is elaborately discussed. It is enough to say in reply thereto that we have examined this brief and the additional authorities therein cited, and deem it unnecessary to further discuss the question.

The judgment of the circuit in both cases is affirmed, with costs.

GILBERT, Circuit Judge (dissenting). I agree with the majority of the court that the crucial question of the present cases is whether or not the appellees had such possession or right of possession of the premises in controversy as to take them out of the list of vacant lands open to settlement at the date when the appellant's grantor selected them as lieu lands. Assuming the settled law to be that land is not mineral land on which mineral has not been discovered, and that therefore the premises in question here were not excluded from selection on the ground that they were not agricultural land, the case resolves itself into the inquiry, what was the nature of the right which the appellees had secured prior to December, 1899, when the appellant's grantor made his selection? The bill alleges that in the month of June of that year the appellees had located upon these premises certain placer mining

claims. The nature of the act by which such locations were made is not stated. It may be assumed that it consisted in marking and establishing the four corners, and posting at one of them a notice of the claim. These acts by themselves alone gave no right whatever to the locator. They were not the initiation of a claim, nor did they constitute constructive possession. The most that could be claimed for them is that the locations took effect at the date of the discovery of mineral in paying quantity, provided that rights of others had not then intervened. *Jupiter M. Co. v. Bodie M. Co.* (C. C.) 11 Fed. 666; *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 608. So far as the present controversy is concerned, therefore, the acts of location made in June, 1899, may be eliminated from the case, for they can have no bearing upon the question under discussion. According to the allegations of the bill, no other act was done by the locators between the date of location and the date of the selection of the land by the appellant's grantor in the following December. The bill charges, however, that after such selection was made the defendants, on or about January 6, 1900, entered upon the lands, and erected derricks thereon, and bored for oil, which on or about the last day of January, 1900, they discovered in paying quantity. This is the state of the facts as presented by the bill, and by which we must be guided in dealing with the demurrer. I submit that the mere location of a mining claim on land that is not mineral, unaccompanied by other acts, is insufficient to initiate any kind of right to the land, and that land covered by such a claim is as truly vacant land open to settlement as is any other land of the public domain. But the opinion of the majority of the court contains the statement that the appellees were, at the time of the selection of these lands as lieu lands, "in the occupancy of the land they had located. They claimed it to be mineral, and they were diligently at work to prove it to be such." This statement is based upon the assumption that

there must be read into the bill certain facts which are found in the affidavits filed on behalf of the appellees upon the application which was made for an injunction. I know of no rule of chancery practice which permits us to do this, or to take as proven any allegation that the complainant has not admitted to be true; but if, indeed, we are authorized to consider the case as if these facts had been incorporated in the bill, I am still of the opinion that the demurrer should have been overruled. What is the nature of the right of a prospector upon the public lands of the United States? It is settled that he is not a trespasser. On the contrary, he is invited to explore and to occupy. By the act of May 10, 1872, all valuable mineral deposits are declared to be free and open for exploration and purchase, "and the land in which they are found to occupation and purchase." It will be observed that by the terms of the statute the right to occupy follows the discovery. There is no statutory right of possession or occupation, or any other right whatever conferred by any statute, prior to discovery, save and except the right of exploration. While permitting the freest exploration, it does not appear to be the purpose of the legislation in regard to the mineral lands of the United States to permit a prospector or an intending locator to initiate any kind of right to such lands prior to a discovery, or to permit him by any act of his prior to discovery to interfere with the appropriation and settlement of lands as agricultural lands under the public land laws, or other laws offering such lands to selection or appropriation. All the decisions to which my attention has been directed are reconcilable with this view. The courts have gone no further than to hold that the possession of a prospector may not be interfered with by one who has no better right than he. This has been held, not as the construction of the mining laws, but, upon motives of public policy, to prevent entries by force and violence. One in possession of premises without right or title may prevent the

intrusion of another who is equally without right or title solely upon the ground that possession is prima facie evidence of title. *Atherton v. Fowler*, 96 U. S. 513; *Brandt v. Wheaton*, 52 Cal. 430; *Campbell v. Rankin*, 99 U. S. 261. It is contended that certain decisions go further than the doctrine above announced, and reference is made to the opinion of Mr. Justice Miller in *Crossman v. Pendery* (C. C.) 8 Fed. 693, and to the language of the supreme court in *Tarpey v. Madsen*, 178 U. S. 215. In the first of these cases it was held that a prospector upon the public mineral domain may, as against another prospector, protect his pedis possessio while searching for mineral. The learned justice proceeded to remark, "His possession, so held, is good as a possessory title against all the world, except the government of the United States." I submit that this language means no more than that such possession is good as against all except those who may initiate a right to the land under the laws of the United States, or who may place themselves in the attitude of acquiring the right or title of the United States. The court in that case was called upon to discuss no question save the relative rights of rival prospectors, and the language used is referable only to that controversy. So, in *Tarpey v. Madsen* the question before the court was whether one who had actually occupied public land with the intention to make a homestead or pre-emption entry could be defeated by the mere lack of a place where to make a record of his intention. Incidentally the court remarked:

"It is a matter of common knowledge that many go on to the public domain, build cabins, and establish themselves, temporarily, at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and inclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not, in the eye of the law, considered as technically trespassers. No individual can interfere with their occupa-

tion, or compel them to leave. Their possessory rights are recognized as of value, and made the subjects of barter and sale."

Clearly, this language means no more than that the possession of the public lands which is referred to in the quotation is good as against a stranger. Can it be said that the supreme court intended to say that one who enters upon and takes possession of public land for purposes of "hunting or trapping," and with "no thought of acquiring title to the land," acquires a right which he can hold as against an intending settler under the homestead laws? The language is susceptible of no such construction,—a construction totally at variance with the trend and policy of all legislation concerning the disposition of the public lands, and directly contrary to the provisions of the statute of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands." The true meaning of the language so quoted from the opinion of the court is found in the words of the same court in *Sparks v. Pierce*, 115 U. S. 413, where it was said:

"Mere occupancy of the public lands, and improvements thereon, give no vested right therein as against the United States, and consequently not against any purchaser from them."

The appellants in the cases under consideration are purchasers from the United States.

The right to explore for minerals upon the public domain is but a license. It does not, prior to discovery, constitute a legal right in or to the land on which the exploration is made. The attitude of the prospector to the land is not like the entry of a settler under the pre-emption law, or like that of any other permitted appropriator of the public lands. He is not required to enter with any intention of ultimately acquiring title, nor does he in fact enter with such intention. His intention must, of necessity, depend upon the result of his investigation. He may rove over the public lands at

will, and may dig and excavate wherever he may choose, provided that he shall not interfere with another who is making like explorations, or trespass upon the lawful possession of another. Until the discovery of the mineral, the law gives him no right whatever, except to defend himself against the invasion of another who has no greater right. If a prospector while exploring for mineral permit another to enter peaceably upon the same premises and to explore, there can be no question that the latter, if he first discover mineral, will acquire the right thereto, and the right to locate the claim. *Belk v. Meagher*, 3 Mont. 65, 104 U. S. 279. The general nature of the right of the prospector has often been defined by the courts. Said Judge Sawyer in *Jupiter M. Co. v. Bodie M. Co.* (C. C.) 11 Fed. 675, "No rights can be acquired under the statute by a location made before the discovery." The circuit court of appeals for the eighth circuit, in *Erwin v. Perego*, 35 C. C. A. 482, 93 Fed. 611, speaking of the two essential acts of discovery and location said, "But when these requirements have been complied with the land is no longer public, but the possession, the right of possession, and the right to acquire the title are irrevocably vested in the locator." There are similar expressions in the decisions of the state courts. "The right of possession comes only from a valid location." *Russel v. Hoyt*, 4 Mont. 421, 2 Pac. 25. "The mere naked possession of a mining claim is not sufficient to hold such a claim against a subsequent location made in pursuance of law." *Hopkins v. Noyes*, 4 Mont. 556, 2 Pac. 280. "Possession is good against mere intruders, but is not good as against one who has complied with the mining laws." *Garthe v. Hart*, 73 Cal. 543, 15 Pac. 93. If it be the law that vacant, nonmineral land, upon which a prospector is making his explorations, is not open to settlement or to selection as lieu land, and that such a prospector, by his mere presence, or by having dug a hole or erected a derrick, acquires the right to retain possession of the land

until his explorations shall be finished, what is the limit of his right, and where is the halting place? What acts of a prospector shall be sufficient, and what shall not be sufficient, to withdraw such lands from settlement or from selection as agricultural lands? How shall a lieu-land selector or a homestead settler know that a prospector is not, or has not recently been, digging or otherwise exploring for mineral in some gulch or cañon of the nonmineral land included in the entry or selection? And how shall he ascertain that exploration once begun has ceased? How extensive an area of the public domain, and for how long a period of time, may a single prospector so occupy that it shall not be open to settlement or selection? It is no answer to these inquiries to say that the court will not in the present case define the nature of the acts which will constitute such a possessory right, but will content itself with the conclusion that the acts set forth in the case at bar are sufficient. I submit that the decision imports into the statute terms that are not there written, and that were not within the intention of congress, and that by the use of the words "vacant land open to settlement" the intention was to refer the selector of lieu lands to the records of the land office, and to the condition of the land itself, whether in the open occupation of a settler holding the possession with the avowed intention of acquiring title under the public land laws, and not to leave the question, what are vacant lands open to settlement? to be variably answered by the judgments of courts upon the special facts presented in each case.

¹NEILSON V. CHAMPAIGNE MINING AND MILLING COMPANY.

(111 Federal 655. U. S. Circuit Court, District of Colorado, Nov. 15, 1901.)

There can be no relocation after entry of a claim for patent in the U. S. Land Office.

Annual labor is not required after entry.

The action of the Land Office as to sufficiency of proofs on a patent protest cannot be reviewed by the courts.

In Equity. On demurrer to bill.

DARWIN T. MASON, for complainant.

A. T. GUNNELL, for respondents.

HALLETT, District Judge (orally). This is a bill to enforce the conveyance of certain mining claims in the Cripple Creek district. The bill charges that in April, 1896, the Champaigne Mining & Milling Company owned the property in controversy, and then made application for patent; that the sum of \$500 had not been expended on each of the claims, and only \$1,630 had been expended on all of them, towards the improvement of them; that the annual work was not done upon the claims in the years 1897 or 1898 or 1899; and that only \$27 was expended upon them in the way of annual work in any of those years. Nevertheless the Champaigne Company proceeded to patent or to make entry for the claims on February 18, 1899. On that date they got a land office receipt for the claims, but in order to obtain this receipt

¹Affirmed 119 Fed. 123; 22 M. R. —.

After failure to work on claim after patent applied for it may be relocated. *South End M. Co. v. Tinney*, 22 Nev. 19; 35 Pac. 89.

Relocation of claim after patenting of portion of it by another title held valid. *Erwin v. Perego*, 93 Fed. 608.

they made false proof as to the amount of work done upon the claims, and therefore were not entitled to make entry as they did. Afterwards, and on May 1, 1899, the plaintiff entered upon the claims and relocated them. The manner of location and the amount of work done are set out in the bill. After he made the location, and in June, 1899, he filed a protest in the land office against the issuance of any patent to the Champaigne Company. This protest was twice amended afterwards. It was brought before the commissioner of the general land office, who overruled it, and afterwards before the secretary of the interior, who affirmed the decision of the commissioner of the general land office. The substance of the bill is that the respondent the Champaigne Mining & Milling Company made entry of the four claims upon false proof, and afterwards (the entry being in the month of February, 1899) the plaintiff entered upon the claims and relocated them May 1, 1899. The bill proceeds upon the hypothesis that the complainant had the right to relocate the claims after the entry in the land office, and that the decision of the commissioner of the general land office and of the secretary of the interior upon the various points raised by him as to the insufficiency of proof made at the time of entering the claims in the land office was an error of law, which may be reviewed in the courts, and he may have the title given to the Champaigne Company transferred to himself, as the person rightfully entitled to the claims. There is a demurrer to the bill which challenges its sufficiency.

The subject has been considered by the supreme court in the case of *Benson M. & S. Co. v. Alta M. & S. Co.*, reported in 145 U. S., at page 428, 12 Sup. Ct. 877, 36 L. Ed. 762. In that case the property in controversy was relocated after an entry in the land office by James C. Luttrell, who was well known in Colorado, though the case arose in Arizona. The ground upon which Mr. Luttrell proceeded was that annual

work had not been done upon the claims after the entry in the land office, and up to the time the patent was issued for the claim. The court states the proposition in this way:

"Upon these facts appellant claims that although the mine was fully paid for by the locators in 1879, and a certificate of purchase received, inasmuch as the patent did not issue until January 10, 1884, and because the plaintiff failed to do a hundred dollars' worth of work in the year 1882, its rights ceased, and the relocation by Luttrell was valid and vested in him the property."

The court then proceeds to consider the question with reference to the law and the decisions of the supreme court and of the land department upon that question, and arrives at the conclusion that annual work was not required after the entry in the land office, and this upon the ground that the government parted with the property upon that entry, although the title remained in the government until the patent was in fact issued. After some consideration of the question and discussion of the statute, the court says:

"In other words, when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties."

And further on, after discussion:

"There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him. The decision of the trial court was correct. The attempted relocation by Luttrell was void, and gave him no rights of possession or otherwise."

This case decides the whole question presented in this bill,

which is that after entry in the land office a relocation of the premises cannot be made so long as that entry stands. The only remedy for the parties is to induce the government to proceed towards setting aside the entry. In that respect complainant in this suit sought to have the entry set aside in the land office, and was overruled, but the ruling of the land office in that particular is not subject to review in this court.

The bill of complaint states no case, and it will be dismissed.

**MURRAY HILL MINING & MILLING CO. v. WILLIAM HAVENOR
ET AL.**

(24 Utah 73; 66 Pac. 762. Supreme Court. Nov. 23, 1901.)

In suit supporting adverse claim each party must rely on the strength of his own title and not on the weakness of his adversary.

Incorporating and placing company in possession. Where the locators of possessory claims surrender possession to a company in consideration of its stock issued to them and the corporation enters and makes expenditures without written evidence of transfer it takes title by estoppel.

When estoppel exists it amounts to a transfer of title by "operation of law."

Strangers to the title cannot plead the want of a formal transfer in such case.

Failure to file affidavit of annual labor does not make the claim open to location if the work was in fact performed.

Findings of fact not clearly against the preponderance of the evidence will not be disturbed on appeal.

Appeal from District Court, Fifth District; E. V. HIGGINS, Judge.

Action by the Murray Hill Mining & Milling Company against William Havenor and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

One conveying as agent not estopped from afterwards buying same property. *Cons. Rep. Co. v. Lebanon Co.*, 15 M. R. 490.

One who allows long user of water is estopped to deny the right to use. *Dalton v. Rentaria*, 2 Ariz. 275; 15 Pac. 37.

An agreement to operate as an estoppel must be an executed agreement. *Rorer I. Co. v. Trout*, 83 Va. 397; 2 S. E. 713; 5 Am. St. 285.

Recital of title may operate as estoppel though deed contain no warranty. *Reynolds v. Cook*, 83 Va. 817; 3 S. E. 710; 5 Am. St. 317.

Defendant sold a quarry which he was under contract to work for plaintiff; thereupon plaintiff sold to same purchaser a railroad used to work the quarry. Held that the latter was not estopped from asserting defendant's first breach. *Treat v. Hiles*, 81 Wis. 280; 50 N. W. 896.

POWERS, STRAUP & LIPPMAN, for appellants.

PATTERSON & MOYER, A. C. BISHOP, S. W. DARKE and
WILLIAM A. LEE, for respondent.

BASKIN, J. The appellants, having applied in the United States land office at Salt Lake City for a patent of the Havenor mining claim, and the respondent having filed in said office a protest and adverse claim, this suit was instituted by the respondent, in pursuance of section 2326 of the Revised Statutes of the United States, to determine the question of the right of possession of the premises adversely claimed by respondent. The application of the appellants was for a patent of the Havenor, which was located on or about the 14th of February, 1899, and embraces a portion of the Murray Hill, Sego Lily, and Silver Dick, claimed by the respondent under the location and a conveyance by the locators thereof to it. The portion of the latter mines so embraced, and which is set out in the complaint, constitutes the premises in controversy, and by the decree was awarded to the respondent.

Plaintiff induced a company to neglect filing report, his object being to sue and collect from a solvent director. Held an estoppel. *Elkhorn Co. v. Tacoma Co.*, 16 Mont. 322; 40 Pac. 606.

A party is estopped to deny ownership after offering to buy the water from the owner. *Jensen v. Hunter* (Cal.), 41 Pac. 14.

One cannot claim profits under a lease made by his firm and at the same time repudiate the lease because not signed by himself. *Enterprise Co. v. National Co.*, 18 M. R. 312.

Conduct of plaintiff's grantor is estoppel against the grantee. *New Jersey Co. v. Lehigh Co.* 59 N. J. L. 189; 35 Atl. 915.

One mine hoisting ore by contract from adjoining owner not estopped to claim the ore as its own. *Empire Co. v. Tombstone Co.*, 20 M. R. 443.

A corporate officer who assists in borrowing money on mortgage for his company is estopped to assert miner's lien ahead of mortgage. *Sutton v. Cons. Apex Co.* 14 S. Dak. 33; 84 N. W. 211. See *Kirchman v. Standard Co.*, 112 Iowa 668; 84 N. W. 939.

Pointing out boundaries to purchaser estops in favor of a party

In the stipulation of the attorneys for the respective parties, which is set forth in the record, the appellants admit certain paragraphs of the complaint, among which are the second, fourth, and all of the fifth except the first five lines, and which are as follows:

"(2) That George Naylor, John W. Meyers, and George H. Murray, and each of them, were at all the times herein mentioned, and now are, citizens of the United States of America, and duly qualified to enter upon and explore the unoccupied mineral lands of the United States, and did enter upon and explore the premises, and discovered and located the Murray Hill, Sego Lily, and Silver Dick lode mining claims, on the 17th, 18th, and 19th days of August, 1896, respectively, and that each of said lode mining claims had thereon at the time of such location, and has now, a vein or lode of rock in place, bearing gold, silver, and other precious metals." "(4) That at the time of the location of each of the said claims, respectively, the said several claims were mineral lands of the public domain, and entirely vacant and unoccupied, and were not owned, held, or claimed by any person or persons as mining ground or otherwise; and that while the same were so vacant, unoccupied, and unclaimed as aforesaid they were located as aforesaid, in accordance with the requirements of the laws of the United States, and the local customs, regulations, and rules of the said Tintic mining district, and the laws of the state of Utah; and that notices of such locations were duly posted, as required by law, upon each of said claims; and that

who purchases on such information. *Schultz v. Allyn*, 18 M. R. 649.

Where grantor prevents exercise of option he must give a reasonable time thereafter to allow a compliance. *Blodgett v. Lanyon Z. Co.*, 120 Fed. 894.

Where lessee used for fuel the oil found on the premises with lessor's knowledge without protest it is a binding acquiescence. *Swift v. Occidental Co.*, 141 Cal. 161; 74 Pac. 700.

Defendant held estopped to claim water of spring on public land where he allowed plaintiff to be at an expense to appropriate it without claim or protest on behalf of defendant. *Orient Co. v. Fleckleton*, 27 Utah 125; 74 Pac. 652.

Where a corporation in taking title to mines assumes advances made by a third party, it is estopped to deny its indebtedness. *Washer v. Independent Co.* 142 Cal. 702; 76 Pac. 654.

A sworn statement in an ex parte proceedings is not conclusive against the party making the statement. *Doyle v. Burns*, 123 Ia. 488; 99 N. W. 195.

said notices were thereafter, on the 17th, 21st, and 24th days of August, 1896, respectively, duly filed for record, and recorded on pages 121, 130, and 136 of Book U of the Tintic mining district, records of Juab county, state of Utah, now in the office of the county recorder of said Juab county, Utah. (5) That said locators remained continuously in possession of said claims, working upon the same, up to about April 10, 1897, and did perform work and labor upon each of said claims in the development thereof, to an amount exceeding in value the sum of one hundred dollars. That on or about the 10th day of April, 1897, the articles of agreement of the plaintiff company were duly executed by the respective incorporators thereof. That it was therein provided that the capital stock of said plaintiff company should be fixed at 250,000 shares of the par value of \$1 per share, and that the same was fully paid up by the transfer to this plaintiff of the mining claims aforesaid as consideration for the organization of said corporation, and the issuance by it of its capital stock to the locators of said claims in amounts following, to wit., to said George Naylor, 38,890 shares; to George H. Murray, 40,740 shares; and to John W. Meyers, 20,370 shares."

Said stipulation, in addition to the foregoing admission of facts, contained the following provisions:

"The said stipulation is intended to admit all facts in issue, as presented by the pleadings in said cause, except the following facts: (1) As to which of the said parties were in the actual possession of the property in dispute and during the times covered in the pleadings. (2) The question of the performance of work and labor and the development of said property in dispute, and the amounts thereof. That this stipulation of the said facts is made, nevertheless, subject to all objections that might be made as to relevancy, materiality, and competency of the admitted facts, the same as though proof were offered to prove the said admitted facts, and as though this stipulation had not been made."

The locators of the Murray Hill, Sego Lily, and Silver Dick, and several other persons, were the incorporators of the respondent company. The articles of incorporation were signed by each of the incorporators, and duly acknowledged, and the oath required by law attached thereto. The articles contained the following provisions: "In consideration of the transfer and conveyance by said George Naylor, John W.

Meyers, and George H. Murray to the corporation of the properties hereinafter described, the said conveyance having been procured and caused to be made to the corporators herein named, the shares of stock herein set forth as subscribed by parties hereto, respectively, and the entire capital stock of the corporation are taken and to be considered fully paid stock, and said conveyance and transfer shall be deemed taken and considered full payment for said stock." The property thereafter described was the Murray Hill, Sego Lily, and Silver Dick. No evidence in writing of a conveyance to the respondent of said mining claims, other than the articles of incorporation, was introduced, and it is conceded that no other written evidence of the same exists. The trial court permitted the articles to be introduced over appellants' objection, which was that the same were incompetent, irrelevant, and immaterial. The admission of the articles is assigned as error.

The specific grounds of the objection urged by appellants' counsel in their brief to the admission of the articles are that that instrument was not a conveyance, and under it no title was acquired by respondent to the premises therein mentioned. The same point is raised by the assignment that the court erred in finding and decreeing that the respondent is the owner and entitled to the possession of the premises in dispute. As the foregoing assignments are intimately connected, they will be considered together. The appellants contend that in this action "the respondent must recover, if at all, on the strength of its own title, and not on the weakness of that of the appellants"; that "a mining claim is real estate, * * * and cannot be transferred by parol, or otherwise than in accordance with the statute of frauds" of this state; that it (the respondent) "did not locate the claims, nor were the same conveyed to it by any instrument in writing by the locators; * * * and that there is no evidence in the case that it ever acquired any title to either of

the claims in controversy, or any part thereof." This being a statutory action, brought in pursuance of the provisions of section 2326 of the Revised Statutes of the United States, its purpose is to determine for the information of the land department, which, if either, of the parties, by a compliance with the mining laws, has acquired the right of possession of the mining premises in controversy. If both fail to establish such right, neither can recover; so that each must rely on the strength of his own title, and not on the weakness of his adversary. The rule in such statutory actions is different from the rule in actions of ejectment. Which, if either of the parties, has shown such right, is the controlling question in this case. If by the articles of incorporation, in connection with the acts of the parties to the same in relation thereto, the interests of the locators in the Murray Hill, Sego Lily, and Silver Dick claims passed to the respondent, then the articles were properly admitted; and if the interest in said claims was so acquired, and the respondent did not afterwards forfeit its right to the same by a failure to comply with the requirements of the mining laws and regulations, the judgment must be affirmed. Section 3916, Comp. Laws Utah 1888, upon which counsel for appellants laid great stress in their argument, is as follows: "No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering the same, or by his lawful agent thereunto authorized by writing."

Passing by the question as to whether the articles are such a "surrender" or "declaration" as contemplated by the statute, were they not, in connection with the acts of the parties to the same sufficient, notwithstanding the statute, to pass

the interests of the locators "by operation of law"? We think they were. Notwithstanding the statute of frauds, it is well settled that an estate in land may be transferred from one person to another by a verbal sale accompanied by possession; also by matter in pais. It is stated in Bigelow Estop. (5th Ed.) p. 453, that "estoppel in pais arises (1) from contract; (2) independently of contract, from act or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is alleged; and it designates some present or past fact fixed by or in virtue of the contract, or of the act or conduct in question." The vital principle of estoppel in pais is that he who, in his dealings and contracts, speaks falsely, or is silent when conscience makes it his duty to reveal the truth, shall not be permitted to speak the truth when conscience requires him to be silent; that he who, by his language or conduct, leads another to believe that certain facts exist, and the other is induced thereby to make expenditures, incur liabilities, or to do what he otherwise would not have done, shall not, to the injury of the other, be permitted to dispute those facts, or by the enforcement of an adverse claim, based upon different facts, disappoint the expectations which his language or conduct inspired. No one is permitted by his language, silence, or conduct to mislead another to his injury. It appears from the articles of incorporation that the principal consideration and basis of the organization of the respondent company and the agreements of the incorporators was the recital in the articles as admitted facts that the Murray Hill, Sego Lily, and Silver Dick mining claims had been conveyed to the company by the locators of said mining claims in full payment of the stock of the corporation, and as consideration for the organization of the company, and the issuance by it of its capital stock to said locators of said claims in the amounts stated in the fifth paragraph of the complaint, which, except the first

five lines thereof, is admitted by the stipulation before mentioned, and that said locators were among the incorporators. It appears from the evidence that the company, after its incorporation, was put into possession of said mining claims, and under the direction, as general superintendent, of S. W. Darke, who was one of said incorporators, expended a considerable sum of money upon said mining claims.

Under the facts thus disclosed, it would be a fraud upon the company and the other stockholders for said locators to deny that said claims were conveyed to the respondent company, and they are therefore estopped from setting up the statute of frauds, for it is "well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent." *Kirk v. Hamilton*, 102 U. S. 69-77, 26 L. Ed. 82. This is so at law as well as in equity, and an estoppel in pais may be pleaded as a defense in an action of ejectment. *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618. As the locators are estopped from asserting any claim adverse to the respondent company, the right to the possession of said claims by estoppel in pais was passed to the company. Independent of that fact, as there is no privity between the appellants and said locators, the former are not in a position to claim the benefits of the statute, because the defense of the statute is a personal one, which the parties sought to be bound may waive, and therefore its benefits cannot be claimed by a stranger to the transaction involved. Wood, St. Frauds, 877, 878; 9 Enc. Pl. & Prac. 703, and cases cited; Browne, St. Frauds, § 135. Said locators do not dispute the transfer to the respondent of said claims, but, on the contrary, by their acts at and subsequent to the time the company was incorporated have induced the company to rely and act upon the truth of the recitals in the articles respecting the transfer. The location of the Havenor claim was made on or about the 14th of February, 1899, at a period subsequent to the incorporation of the respondent

company. The appellants claim that the evidence shows that at the time the Havenor was located the Murray Hill, Sego Lily, and Silver Dick claims had been forfeited, and were subject to relocation by the failure of the claimants to annually perform the labor or make the improvements required by section 2324 of the United States Revised Statutes, and by a failure to file in the county recorder's office the affidavit of annual labor and improvements required by section 1500 of the Revised Statutes of Utah. In respect to the first alleged ground of forfeiture the trial court found that the respondent "at all times, since the said June, 1897, the date when it acquired the ownership of the said claims, has in good faith performed the annual labor and development work, and made the necessary improvements required by law to maintain its said locations." While the evidence in relation to the subject of annual labor and improvements was conflicting, there was sufficient competent evidence to support this finding, and, as the trial judge had the witnesses before him, he was in a better position to judge of the weight of the testimony than the appellate court. Where, as in this instance, the finding is not clearly against the preponderance of the evidence, the appellate court will not set it aside. We are of the opinion that it is a sufficient finding of an ultimate fact in issue. In regard to the second alleged ground of forfeiture, it appears that the affidavit of labor and improvements was not filed by respondent in the county recorder's office within the time required by section 1500, Rev. St. Utah, but was filed in said office after the location of the Havenor was made. In section 2324, Rev. St. U. S., it is enacted that "upon a failure to comply with these conditions [which are the performance of labor and the making of the improvements required by the statute] the claim or mine upon which such failure occurs shall be open to relocation in the same manner as if no location of the same had ever been made." From the foregoing provisions it is as clear as if it had been

explicitly stated that, after a mining claim has been located in conformity with the mining laws and regulations, it is not subject to relocation as long as the locator or his successor in interest continues to perform the labor or make the improvements upon the same required by the United States mining law, and that such a locator, or his successor in interest, has a vested right in such a claim which can only be forfeited by a failure to comply with the conditions mentioned. It follows that the respondent did not forfeit its right by failing to file with the county recorder the affidavit required by section 1500, Rev. St. Utah, and that the trial court did not err in permitting, over the objection of the appellants, the respondent to introduce evidence tending to show that it had performed the labor and made the improvements on its said claims as required by section 2324, Rev. St. U. S. The appellants made other objections, not embraced by the stipulation of the parties, which it is not necessary to decide, as the question presented to us under the stipulation, and which we have already passed upon, is decisive of the case. The facts disclosed by the record support the judgment of the lower court.

The judgment is affirmed, with costs.

MINER, C. J., and BARTCH, J., concur.

TUOLUMNE CONSOLIDATED MINING CO. v. A. C. MAIER.

(134 California 583; 66 Pac. 863. Supreme Court. Nov. 25, 1901.)

¹**Location without discovery.** There can be no valid location of a mining claim without an actual mineral discovery thereon.²**Discovery does not relate back.** Conceding that a subsequent discovery may validate the claim, the land remains government land up to the time of such discovery.**Discovery on appropriated ground.** A location of a mining claim based on a discovery of mineral within the limits of another existing and valid location is void.**Where a ditch is located across a claim which has at the time no valid discovery** such ditch remains a valid easement and is not divested by any later discovery of mineral upon the claim.

Department 2. Appeal from Superior Court, Tuolumne County; G. W. NICOL, Judge.

Injunction by the Tuolumne Consolidated Mining Company against A. C. Maier. Judgment for defendant on his cross complaint, and plaintiff appeals. Reversed.

J. P. O'BRIEN, for appellant.

F. W. STREET, for respondent.

THE COURT. Action for an injunction against the interference of defendant with plaintiff's ditch. The defendant filed a cross complaint, alleging that he was the owner of the Buena Vista quartz mine, situated below the head of plain-

¹*Buck v. Jones*, 18 Colo. App. 250; 22 M. R. —.²*Beals v. Cone*, 20 M. R. 591.Exact evidence of all details is not to be expected in making proof of discovery made many years before trial. *Becker v. Pugh*, 17 Colo. 245; 29 Pac. 173.Discovery after location avails to perfect the title; no other title intervening. *Weed v. Snook*, 144 Cal. 439; 77 Pac. 1023.

tiff's ditch, on Duckwall creek, and that plaintiff, by means of its ditch, had deprived defendant of the use of the water of said creek in and upon his said quartz mining claim; also that plaintiff had constructed its said ditch across defendant's said mine. The court gave defendant judgment for restitution of that portion of his mining claim across which the ditch was constructed, and perpetually enjoining plaintiff from diverting the waters from said creek, and from in any manner preventing at least 20 inches of the natural waters thereof from flowing in their natural channel over and through said Buena Vista quartz mine.

The appeal before us is from an order denying plaintiff's motion for a new trial.

It appears that the plaintiff, a mining corporation, owned the Providence mine, and in connection therewith it owned the ditch running across defendant's said Buena Vista mining claim; that the construction of this ditch and the accompanying appropriation of water was initiated on the 12th day of June, 1897, by duly posting and recording a notice of appropriation of 500 inches of the waters of said Duckwall creek for use on said Providence mine; that thereafter the construction of the ditch proceeded with due diligence to the time of its completion, in October, 1898.

Prior to the initiation of the construction of this ditch, and on the 10th day of February, 1896, the defendant located the said Buena Vista quartz mine. It appears that the last named mine, as located, overlapped to a large extent a previously located claim known as the "Cornet Mine." Duckwall creek runs through that part of the Buena Vista which does not overlap any other claim. In 1898 the defendant constructed a dam in Duckwall creek, and in the month of December of that year he commenced for the first time to divert and use the waters of said creek for mining and milling purposes. The court found, in effect, that the defendant, with others, duly located the Buena Vista mine on the 10th

day of February, 1896, and that the defendant ever since that date had been the owner of an interest therein.

The court further found that ever since said last-mentioned date, and until prevented by plaintiff from so doing, the defendant used the waters of said creek, to the extent of 20 inches thereof, "in and upon said Buena Vista quartz mine, for mining and milling purposes."

The appellant attacks both these findings on the ground that they are not supported by the evidence, and we think the ground is well taken.

As to the latter finding, there was no evidence of the posting of any notice of appropriation, and the testimony of respondent as a witness is to the effect that his first use of the water for mining purposes was not earlier than December, 1898, when he first used it in his mill. There was no evidence of any earlier use than this of said water for mining or milling purposes by defendant. So far as the appropriation of the waters of said creek is concerned, the evidence, without conflict, shows plaintiff's appropriation to have been prior in point of time to defendant's.

As to the other finding, we think the evidence fails to show that the Buena Vista mine was "duly located," as against plaintiff's right to maintain his ditch, for the reason that there is no evidence of any discovery of minerals until after plaintiff's right to maintain his ditch thereon had attached. We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon. *Erhardt v. Boaro*, 113 U. S. 535, 5 Sup. Ct. 560, 28 L. Ed. 113; *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669. And, for the purpose of this case, it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may be here conceded that a previous location may be made valid by a subsequent discovery of mineral; still there can be no valid claim to the land, and it must be treated as government land

up to the time of such discovery. Of course, to be effective, the discovery must have been made outside the limits of the Cornet mine. "A location based upon a discovery made within the limits of another existing and valid location is void." Lindl. Mines, § 337; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; *Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66. The evidence shows that the Cornet mine came down to the north bank of said Duckwall creek. We have searched respondent's testimony in vain to find where he testifies that he ever made any mineral discovery south of this creek or outside of the Cornet mine. He says in his testimony: "I prospected the ground some, prior to making the location. I discovered quartz veins in and upon the ground. I prospected these veins to know if they carried gold." Where he did this prospecting—whether it was on the Cornet mine or not—does not appear; nor does the result of his prospecting appear. Though he prospected for gold, he fails to tell us that he found a color. He should have discovered a mineral bearing vein or lode, to make his claim valid. Rev. St. U. S. § 2320. The testimony of the other witnesses cited in respondent's brief is not available on the question of discovery, because it relates to a time subsequent to the construction of appellant's ditch. Some six or seven miners who had examined the Buena Vista testified that there was no vein or lode on it; that they had examined the points where the vein or lode was said to be, and there was no vein there. There was then a sharp conflict in the evidence as to whether the alleged mine actually contained a vein or lode at the time of the trial or at all, but on the question of a mineral discovery there was an entire absence of evidence showing such discovery at any time previous to the construction of appellant's ditch. Treating the land, then, as government land at the time of the construction across it of appellant's ditch, whatever rights may have been acquired in it by subsequent discoveries of mineral were subject to the

easement of plaintiff's ditch, and to his rights as a prior appropriator. *Smith v. Hawkins*, 110 Cal. 125, 42 Pac. 453; *Broder v. Mining Co.*, 101 U. S. 275, 25 L. Ed. 790. The findings referred to are without support in the evidence, and the order appealed from is therefore reversed.

Hearing in bank denied.

HARVEY LAWSON ET AL. V. W. E. KIRCHNER.

(50 West Virginia 344; 40 S. E. 344. Supreme Court of Appeals.
Nov. 30, 1901.)

Suit by infant. Where a debt or demand is payable to infants, suit therefor is properly brought in their names by their next friend, although the money, when recovered, goes to their guardian.

Rent till well completed. A person who accepts an oil or gas lease, with a stipulation therein contained to pay a monthly rental until a well is completed, or until the expiration of a certain fixed term, is bound to pay such rental, although he does not, within such term, enter upon the land and complete such well, unless he was prevented from doing so by the plaintiffs, and not by mere personal default.

(Syllabus by the court.)

Error to Circuit Court, Tyler County; G. W. FARR, Judge.

Action by Harvey Lawson and others against W. E. Kirchner. Judgment for plaintiffs, and defendant brings error. Affirmed.

An oil lease provided that if the first well produced 10 barrels per day lessor should receive \$500; if the second well should produce 15 barrels lessor should receive the further sum of \$1,000. *Held*, that the lessee was bound to the payment on the second well which produced its 15 barrels though the first well produced nothing. *Brushwood Co. v. Hickey* (Pa.), 16 Atl. 70.

Construction of oil lease reserving penalties for failure to complete well. *Smiley v. Western Pa. N. G. Co.* 138 Pa. 546; 21 Atl. 1. *Agerter v. Vandergrift*, 138 Pa. 592; 21 Atl. 202.

An oil lease required lessees to drill well in six months or pay specified rental per annum for delay. After the six months were up the lessor relet to other persons: *Held*, that he could not collect rent from the lessee. Rent cannot be collected after forfeiture. *Wolf v. Guffey*, 161 Pa. 276; 28 Atl. 1117.

A lease to run a term certain and afterwards at a rental if productive will not authorize lessee to quit without notice, nor to quit at all if the lease productive. *Double v. Union Heat Co.* 18 M. R. 327..

ENGLE & RIGGLE, for plaintiff in error.

PUGH & PUGH, J. V. BLAIR, and C. R. MARTIN, for defendants in error.

DENT, J. W. E. Kirchner complains of a judgment of the circuit court of Tyler county rendered against him on the 20th day of August, 1900, for the sum of \$4,873.89, with interest and costs, at the suit of Harvey Lawson, an adult, who sues in his own right, and Ella Lawson, Maggie Lawson, James Lawson, and Calvin Lawson, infants, who sue by C. P. Tustin, their next friend.

The questions presented are as follows:

First, that the suit was improperly brought in the name of the infants by their next friend, but it should have been brought in his name as guardian;

Second, that the decree of the circuit court authorizing the leasing of the land for oil purposes was void, for the reason that the statute authorized the court to sell, and not to lease;

Third, that the defendant did not agree, and is not bound by the conveyance of August 20, 1895, made to him by C. P. Tustin, guardian of the plaintiffs, to pay the rental therein stipulated to be paid, and for which this suit is brought.

These questions were raised by demurrer to the declaration, pleas tendered, and motion to set aside the verdict.

The decree confirming the lease is as follows:

"This cause came on this 19th day of August, 1895, to be finally heard upon the papers formerly read, orders heretofore made herein, and upon the report of C. P. Tustin, guardian of the infant defendants, Harvey Lawson, Ella Lawson, Maggie Lawson, James Lawson, and Calvin Lawson, of the sale made by him of the interests of said infants in the undivided seven-eighths of all the oil and in all of the gas in and underlying the tract of 96 acres of land in the petition in this proceeding mentioned and described, from which report it appears to court that said guardian did, on the 17th day of August, 1895, sell at private sale the interests of said infants in the undivided seven-eighths of the oil, and in all of the gas, in and under-

lying the said premises, to W. E. Kirchner, for the term of two years and as much longer as oil or gas is found in paying quantities, for the sum of \$2,471.43 cash in hand paid by said purchaser, reserving to said infants the usual royalty of one-eighth of five-sevenths of all the oil obtained from said premises produced in the crude state, the same to be set apart in the pipe lines running said petroleum to credit and for the benefit of said infants, the said infants to fully use and enjoy said premises for the purposes of tillage, except such part as may be necessary for such mining purposes and a right of way over and across said premises to the place of mining and operating, the purchaser not to put down any well or wells on the said premises within ten rods of the buildings now on said premises without the consent of both parties, and for the further consideration that the said W. E. Kirchner shall pay to said infants a monthly rental of one dollar and seventy-eight and four-seventh cents per acre from this date, the first of said rentals to become due on the 13th day of September, 1895, and on the 13th day of each month thereafter, until a well is completed on said premises, or until the expiration of said term of two years, and for the consideration also that the said purchaser pay to said infants the sum of \$214.28 per annum for the gas from each well on said land when utilized off the premises, and the said infants to have gas for domestic purposes after supplying the boilers on the premises for drilling and pumping purposes, the said purchaser to have the privilege to lay all necessary pipe lines, and to erect all necessary buildings, for said mining purposes, and the right to remove all machinery, fixtures, engines, boilers, tanks, stations, structures, offices, and buildings placed on said land by the purchaser, and there being no objections or exceptions to said report, the same is approved and said sale confirmed.

"It is therefore adjudged, ordered, and decreed that said C. P. Tustin, guardian as aforesaid, do make and deliver to said W. E. Kirchner, on behalf of said infant defendants, a deed for their interests in the undivided seven-eighths of the oil, and in all of the gas, in and underlying said tract of 96 acres of land, in accordance with the terms shown by said report and this decree.

"It is further adjudged, ordered, and decreed that said guardian be and is hereby authorized and directed to apply sufficient of the proceeds of the sale of the interests of the said wards in the oil and gas in and underlying said tract of 96 acres of land to the payment of the proportionate shares of said infants of the indebtedness of W. S. Lawson, deceased.

"It is further adjudged, ordered, and decreed that the costs of this proceeding, to be taxed by the clerk of this court, including a fee of \$3.00 to C. R. Martin, guardian ad litem to said infants, also a fee of \$2.50 to C. P. Tustin, guardian, for making said deed, be paid

equally by said infants. And this proceeding is dropped from the docket."

The conveyance or lease in the shape of a deed poll follows the decree strictly.

The lease stipulates that the rentals should be paid to the infants, and not to the guardian. Hence the infants, and not the guardian, had the right to sue for the same in the manner pointed out by the law. The lease was not one the guardian had the right to make, except by the direction and under the authority of the circuit court. It had been better if the circuit court had required the lessee to give bond and surety for the prompt payment of the monthly rentals, and then the questions here presented would not have arisen. The court could have required the rentals paid to the guardian instead of to the infants, and he could have instituted suit in his own name, but, being made payable to the infants, the suit was properly brought. The guardian was not responsible for these rentals until they were reduced to his possession, and in the meantime he might die, resign, be removed, or the children, as one of them did, come of age, and there is no way provided by law to continue or revive the suit in their names had the suit been brought in the name of the guardian. *Burdett v. Cain*, 8 W. Va. 282, 285, 287. The second objection, that the court was without the power to lease, but could only sell infants' real estate, or some portion thereof, is met by the fact that the lease of a tract of land for oil and gas purposes is a conditional contingent sale of the oil and gas in place; that is, real estate. *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. 436, 25 L. R. A. 222; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292. The title is inchoate and dependent on the finding of the oil and gas by the purchaser in a limited number of days. The sale never becomes absolute and fully consummated until the conditions

thereof are fulfilled and the contingency on which consummation depends happens, and if they fail, by reason of the default of the purchaser, the sale is at an end. *Steelsmith v. Gartlan*, 45 W. Va. 27, 29, S. E. 978, 44 L. R. A. 107. While it is a sale of real estate, so far as the lessors are concerned, it is only of such part thereof as the lessee may be able to find and convert into personalty. But it is such a sale as only the court can make and the guardian cannot make, except under the direction and authority of the court. During the life of the lease the lessee has such an interest in the oil and gas in place that he can prevent any other person, even the owner of the land, from committing waste by the extraction of such oil or gas. *Trees v. Oil Co.*, 47 W. Va. 107, 34 S. E. 933. Hence we must hold that the lease in this case was a sale of the oil and gas in place, conditioned on the contingency of the lessee finding the same in a limited time and converting them into personalty by reduction to actual possession and control.

The last objection is that, the defendant never having signed the lease or conveyance, and never having entered upon or taken actual possession of the property, he cannot be held liable for the rentals reserved. He permitted the court to confirm the sale to him, accepted the conveyance, placed it on record, paid the purchase price and one month rental, and raised no objection thereto in any manner until the two-years limit had expired.

In 3 Devl. Deeds, § 1074, it is said: "The principle is well settled that where one by deed poll grants land and conveys any right, title, or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment or perform such duty,

and, not having sealed the instrument, he is not bound by it as a deed; but, it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie." The defendant admits this to be the law, but claims that he never entered on the estate. The plaintiffs in no wise hindered him from so doing. If they in any manner prevented him from enjoying the same his defense to their action would have been well founded. They did not do so. He held them bound for two years, and, they being bound by the conveyance, he was also bound thereby. It is not shown in evidence that he was prevented by anybody from a full enjoyment of the estate conveyed. If he did not have possession it was his own fault. The so-called rental in this case is not reserved for his enjoyment of the estate, as in an ordinary lease of realty. But it is compensation or commutation money for his neglect to enjoy it, and at the same time preventing the plaintiffs from conveying the right to the enjoyment thereof to some one else for the stipulated period of two years. His agreement is to pay the monthly rental until a well is completed or until the expiration of the term of two years. As soon as he entered upon the enjoyment of the lease and completed a well, the rental was to cease, but if he failed to enter and complete a well the rental was to continue until the expiration of his two-years term. So the rental was not for the actual use or enjoyment of the estate, but was compensation to the plaintiffs for giving him the period of two years in which to enter and enjoy. It was a matter of speculation on his part, in which he took the risk of paying the rentals or entering and enjoying. It seems now a hard contract to perform, yet he prevented the plaintiff for the period of two years from making sale to some one else with whom they might have had better terms and enjoyed greater profits, or might have had their lands fully explored and developed. What riches may lie under them no one can tell, although

exploration thereof may produce many dry holes. The plaintiffs lived up to their contract, and the court cannot relieve the defendant from the performance of his as it is written.

The judgment is affirmed.

Affirmed.

V. VAN BUREN V. MARGARET MCKINLEY.

(8 Idaho 93; 66 Pac. 936. Supreme Court. November 30, 1901.)

Where there is a substantial conflict in the evidence, the appellate court will not disturb the verdict of the jury.

Temporary district recorder. Under the provisions of section 3103, Rev. St., a county recorder may appoint a deputy recorder at any place in his county where he may deem it necessary, and at all places 10 miles distant from an existing office, when 10 or more mining locators interested, petition for the appointment of a deputy; and, upon the failure of the recorder to appoint a deputy within 10 days after receiving such petition, the resident miners of such district may appoint temporarily a recorder of such district.

No deputy. A district recorder appointed by the resident miners has no authority to appoint a deputy, and the person so appointed has no authority to administer oaths.

An affidavit to a mining location notice must be sworn to before an officer authorized by law to administer oaths.

There can be no officer de facto, where there is no office.

Verification to location notice. The provisions of section 3104, Rev. St., and amendments thereto, requiring an affidavit to be attached to a mining claim location notice, is not in contravention of the provisions of section 2322, Rev. St. U. S.

(Syllabus by the court.)

Appeal from District Court, Boise County; Geo. H. STEWART, Judge.

Action by V. Van Buren against Margaret U. McKinley. Judgment for defendant, and plaintiff appeals. Affirmed.

A district record, to be valid must describe the claim and must be public and accessible. *Fuller v. Harris*, 29 Fed. 814.

A record is not prima facie evidence of its own recitals where it recites more than the statute requires. *Flick v. Gold Hill Co.* 8 Mont. 298; 20 Pac. 807.

The fact that the notice of location is not recorded is immaterial in the absence of local rule or custom requiring it. *Souter v. Maguire*, 78 Cal. 543; 21 Pac. 183.

A record is not required unless by mining district rule. It is not a universal custom. *Poujade v. Ryan*, 21 Nev. 449; 33 Pac. 659. *Haws v. Victoria Co.* 160 U. S. 303.

HAWLEY & PUCKETT, for appellant.

C. C. CAVANAH, for respondent.

SULLIVAN, J. This is an action on an adverse claim upon an application of respondent for a patent from the United States to the Red Warrior lode-mining claim, situated in West View mining district, Boise county, Idaho. The complaint is in the usual form, and alleges among other things, that the appellant is the owner of the identical mining ground included in the boundaries of said Red Warrior mining claim under the name of the Fair Pay lode-mining claim. The cause came on for trial before the court with a jury, and on the trial the notice of location of said Fair Pay claim was offered in evidence by the appellant. Objection was made to its introduction on several different grounds, and on the ground that no affidavit in writing was attached thereto, as required by the laws of this state (section 3104, Rev. St., and amendments thereto.) The court sustained the objection. Deeds of conveyance made by the locators of said Fair Pay mining claim were offered in evidence, and were excluded on the objection of respondent. Thereupon the appellant called numerous witnesses to show that the assessment work required by law had not been done on the Red Warrior claim for the years 1899 and 1900. Evidence on behalf of the respondent was then introduced to prove that the required assessment work had been done on said Red Warrior claim, and rebutting evidence was introduced on the part of the appellant. The verdict and judgment were in favor of the respondent. A motion for a new trial was made, and overruled by the court. This appeal is from the judgment and order denying a new trial.

The record shows that the Red Warrior mining claim was located in 1892, and that in January 2, 1900, the grantors of appellant attempted to relocate the identical ground included

in the Red Warrior claim under the name of the Fair Pay claim, for the reason, as it is claimed, that the annual assessment work required by law had not been done on the Red Warrior claim for the years 1899 and 1900. Upon that question the appellant introduced considerable evidence to prove that such work had not been done, and the respondent called several witnesses, who testified that it had been done. There was a serious conflict in the evidence on that point, and the jury found that it had been done. When there is substantial conflict in the evidence, this court will not disturb the verdict on the ground of the insufficiency of the evidence to support it. If the annual assessment had been done on the Red Warrior claim for the years 1899 and 1900, the ground was not open to location at the time the Fair Pay location was made.

However, the main contention on this appeal is over the order of the court in refusing to admit the Fair Pay location notice in evidence; and it arises over the alleged affidavit attached to said notice of location. It is signed by M. A. Mitchell, one of the locators, and purports to have been sworn to before H. W. Dorman, district recorder, by W. J. Batchman, deputy. The contention is that there is no such an office as deputy district recorder, and therefore no such officer; hence the necessary affidavit was not sworn to before a person authorized to administer an oath. Section 3103, Rev. St., is as follows: "Every claim must be recorded within fifteen days from the time of the posting of the notice, in the district in which the same is situated, or at the nearest office to the claim. For the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where he may deem it necessary, and at all places more than ten miles distant from an existing office, whenever ten or more mining locators interested petition for the appointment of such deputy. Upon the failure of any recorder to make the appointment of a

deputy for ten days after a petition in writing has been presented to him, the resident miners at such district may appoint temporarily one of their number to act as recorder of the district, whose records shall be as valid as if made by a deputy, and must be entered by the recorder as hereinafter required: provided, that whenever at any time afterwards the recorder appoints a deputy for such district or place, the authority of the person elected by the resident miners ceases."

Said section provides but two ways in which a recording officer for a mining district can be selected: (1) By appointment by a county recorder; (2) upon the failure of the county recorder to appoint within 10 days after receiving the petition named in said section, the resident miners may appoint temporarily one of their number to act as recorder of their district. It is apparent from the record that H. W. Dorman had been selected by the resident miners as their district recorder, and was not appointed by the recorder of said Boise county as his deputy. However, in our view of the question under consideration, it makes no difference whether he had been appointed by the county recorder or selected by the resident miners of said district; for in either case we know of no provision of law authorizing a deputy recorder to appoint a deputy, and no provision has been called to our attention that authorizes a district recorder selected by the resident miners to appoint a deputy. The legislature has named in our statute all of the different officers and persons who are authorized to administer oaths, and among them are not enumerated deputies appointed by mining district recorders. We are therefore forced to the conclusion that there is no such officer as "deputy district recorder," and that the affidavit attached to said location notice was not sworn to as required by law.

It is contended by counsel for appellant that said "deputy district recorder" was a de facto officer, and for that reason

his administration of said oath was authorized. The difficulty is there must be an office for a defacto officer to fill, and, as there is no such office as "deputy district recorder," there can be no de facto officer to fill it. See *Mechem*, Pub. Off. 322.

It is contended by counsel for appellant that an affidavit is not necessary to make a valid location; that the law requiring it imposes a condition precedent upon citizens about to locate mining ground not contemplated by the laws of the United States, and in conflict with them, and therefore the state law imposing such condition is absolutely void. Under the provisions of section 2322, Rev. St. U. S., state, territory, and local regulations are authorized to be imposed as a condition precedent to the possession of mining claims, not in conflict with the laws of the United States. Requiring an affidavit to be attached to the location notice of a mining claim as provided by section 3104, Rev. St., is not in conflict with the provisions of said section 2322. It is a reasonable regulation that the legislature is fully authorized to make. *Dunlap v. Pattison* (Idaho) 42 Pac. 504. The supreme court of Montana in several cases have held that the statute requiring an affidavit to a location notice of a mining claim was not in contravention of the federal statutes. *McBurney v. Berry*, 5 Pac. 867; *McCowan v. McLay*, 40 Pac. 602; *Berg v. Koegel*, 40 Pac. 605.

We have carefully examined the numerous errors assigned, and find no error in the record.

The judgment is affirmed, with costs in favor of respondent.

QUARLES, C. J. and STOCKSLAGER, J., concur.

LYMAN CARTER V. MORRIS G. RHODES.

(135 California 46; 66 Pac. 985. Supreme Court. Dec. 10, 1901.)

There should be no reversal for variance where the complaint is good against general demurrer and the appellant has not been misled.

¹Price payable out of proceeds. Where a contract for the sale of an interest in a mine provided that a balance of the purchase price was to be paid only out of the net proceeds of the working of the interest conveyed, and in no event was to become a personal claim against the purchaser, but subsequently the vendor agreed to permit the purchaser to sell his interest, provided the purchaser would become personally responsible for the balance due, there was sufficient consideration for such subsequent agreement, and the vendor was entitled to recover.

Voluntarily placing it beyond power to perform. The purchaser, by selling the interest, rendered it impossible for the vendor to recover the balance due from the net proceeds thereof, and at once became personally responsible for such balance.

Department 1. Appeal from Superior Court, Santa Clara County; A. S. Kittridge, Judge.

Action by Lyman Carter against Morris G. Rhodes. Judgment for plaintiff, and defendant appeals. Affirmed.

¹*McIntyre v. Ajax Co.* 20 M. R. 142.

Construction of note payable on sale of mine. *Cheney v. Barber*, 3 M. R. 66.

Defense to note payable out of mine. *Anspach v. Bast*, 12 M. R. 110.

Owners agreed to pay their attorneys a certain per cent. in case of sale: Held, no right of action against purchasers although they bought with knowledge of the contract. *Weiss v. Gullett*, 18 Colo. App. 122; 70 Pac. 442.

Where there was an agreement for plaintiff to incorporate a company, some of its shares to be issued to plaintiff, and the company was formed but no shares issued to plaintiff, the right of action is not against the company but against the contracting parties. *Grant v. Walsh*, 36 Wash. 190; 78 Pac. 786.

A. L. RHODES, for appellant.

JOHN H. YOELL, R. L. McKEE and W. J. DONOVAN, for respondent.

VAN DYKE, J. The respondent, on December 24, 1894, was the owner of an interest in a certain mine known as the "Nickel Plate," and on that date he and the appellant entered into an agreement in writing, by which it was agreed that the respondent should sell; and he did sell, to the defendant, one-half interest in said mine for the sum of \$5,000; \$4,000 being paid on the execution of the agreement, and \$1,000 balance to be paid only out of the net proceeds of the working of the one-half interest in said mineral claim conveyed, "and that in no event should the thousand dollars, or any part thereof, become a personal claim against the party of the second part,"—that is, the appellant. It was further provided in said agreement that the respondent should expend not less than \$2,000 in the development of the mine, and at his own expense pay off and discharge liens and incumbrances that then existed upon the same. The terms and conditions of the agreement were kept and performed on the part of the vendor, the respondent, but before any part of the sum of \$1,000 had been received according to the agreement the appellant, in the summer of 1895, became desirous of selling his said interest in the mine to one McCune, but the latter, before purchasing the same, insisted that the claim of respondent for the payment of the \$1,000, the balance of the purchase price, should be canceled and released, and that said mine should be clear of incumbrances. The respondent claimed that, if the appellant sold his interest in said mine, he would become personally liable for the \$1,000, but this was denied by the appellant. However, McCune would not buy unless the respondent released his claim on the mine, and the appellant, in order to make the sale to McCune, re-

quested the respondent to make such release, which he did, but with the understanding that it did not release the appellant from respondent's claim, and that appellant would become personally responsible to him for the \$1,000. Thereupon the sale was made by appellant to McCune of his interest in the mine, after the respondent had executed a release and abandonment of his interest in the mine according to the agreement. The appellant thereafter failing and refusing to pay the \$1,000, this action was commenced. The appeal is taken from the judgment in favor of the plaintiff in said action, and from the order denying defendant's motion for a new trial.

The complainant contained two counts. A general demurrer was interposed to each, and sustained as to the first count, and appellant contends that the demurrer should have been sustained as to both counts. The complaint upon which the case was tried was sufficient against the general demurrer, and will sustain the findings and judgment. Code Civ. Proc. 452-475. There is not sufficient variance, if any, between the proof and the allegations in the complaint, to prejudice the appellant, or to justify a reversal on that ground. "No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." *Id.* 469.

The evidence is sufficient to support the findings. There was a consideration for the obligation of the appellant to pay \$1,000 upon the sale of his interest in the mine by the release of the respondent, in order to permit such sale. Further, by the sale of his interest in the mine the appellant put it out of the power of the respondent to receive the \$1,000 from the net proceeds of that interest, and appellant at once became personally responsible to pay the \$1,000. In the case of *Wolf v. Marsh*, 54 Cal. 228, the defendant executed to the plaintiff a written agreement, whereby he promised

to pay a sum of money when realized from the profits of certain coal mines in which he owned an interest. Before the mines had yielded any profit to the defendant, he sold and conveyed his interest in them to a stranger. The court in that case say: "By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary that, if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be used therefor, without demand, even though the time specified for the performance has not expired." See, also, *Love v. Mabury*, 59 Cal. 484; Bish. Cont. § 1426; *Bagley v. Cohen*, 121 Cal. 604, 53 Pac. 1117. In *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962, in an agreement to pay \$1,700 out of the net proceeds of the product of mineral, timber, and wood taken from a certain section of land, it was specified that: "Said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation." It was alleged in the complaint in that case that the party had sold and conveyed to other persons the land and product thereof, and had not paid a part of the money which she had agreed to pay; and the court say, "This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof;" referring to *Wolf v. Marsh*, and the other cases cited.

Judgment and order affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

ORLANDO CARDELLI ET AL. V. THE COMSTOCK TUNNEL CO.
ET AL.

(26 Nevada 284; 66 Pac. 950. Supreme Court. December 17, 1901.)

¹Action of court below on injunction. Where, on a motion for injunction to restrain defendant from interfering with plaintiff's alleged right to use one-half the waters flowing through defendant's tunnel, the evidence was conflicting as to the facts, and the trial court found the facts against the plaintiff, its order denying the injunction should not be reversed.

²Drainage from tunnel not a natural stream. Where all the waters flowing through a tunnel are derived from drainage of a mine and of the country between the mine and the mouth of the tunnel, and from pumpings into the tunnel from lower levels, and the water which has been used in the mine for electrical purposes, such tunnel is not a natural stream, and its waters are not subject to appropriation.

Appeal from District Court, Lyon County; C. E. Mack, Judge.

Action by Orlando Cardelli and others against the Comstock Tunnel Company and others. From an order refusing an injunction, plaintiffs appeal. Affirmed.

TORREYSON & SUMMERFIELD and JOHN LOTHROP, for appellants.

W. E. F. DEAL and W. E. WINNIE, for respondents.

¹Harmless ditch will not be enjoined. *Hoye v. Sweetman*, 19 Nev. 376; 12 Pac. 504.

²Plaintiff's grantor appropriated water after it escaped from a mining ditch. Held that he could not enjoin the owners of the ditch from using it for placer purposes to its injury for irrigation purposes. *Fair Play Co. v. Weston*, 21 M. R. 725.

Consideration of the rights of parties where water owned on surface is drained away by a tunnel driven for legitimate purposes. *Herriman Irr. Co. v. Butterfield M. Co.* 19 Utah 453; 57 Pac. 537.

FITZGERALD, J. This is an action to determine the plaintiffs' alleged right to one-half of the waters flowing and to flow from the Sutro tunnel, for \$2,800 damages for defendants' interference with said alleged right, and for a perpetual injunction and order restraining said defendants from interfering with said alleged right in future. The waters in controversy may, from the testimony in the case, be thus described, as to their source, nature, and situation:

On the 4th of February, 1865, the legislature of the state of Nevada passed an act (Laws 1864-65, c. 26) with the following title: "An act granting the right of way, and authorizing A. Sutro, and his associates, to construct a mining and draining tunnel." Sections 1 and 2 of said act are as follows:

"Section 1. A. Sutro, and his associates, successors and assigns, shall, for the next fifty years ensuing, from and after the approval of this act, have, possess and enjoy the exclusive privilege of the right of way, and to run, construct and excavate a tunnel running into the Comstock lode, from any point to be selected in the foot hills of the Carson River valley, within the boundaries of Lyon county, and between Corral canon and Webber canon; also, to sink mining shafts along the line or course of said tunnel, and connecting with the same at such points as may be selected by such parties: provided, however, the right of way hereby granted for said tunnel shall in no manner or in any wise interfere with any rights heretofore acquired in and to the said Comstock lode, or any other lode along the line, or in the vicinity of said tunnel, or any rights of property heretofore acquired by any person or corporation: and, provided, further, that said right of way for said tunnel shall in no wise interfere with the rights of miners, according to the laws and customs of this state.

"Sec. 2. That the object of said tunnel being for the purpose of draining the Comstock lode, and all other lodes along its line of direction or course, and for the discovery and development of other lodes through which the same may pass, and for the general purpose of advancing the mining interest of this state, the rate, price or sum of money to be charged for the benefit derived by the persons, companies or corporations along the line of said tunnel, and others who may be benefited by the drainage of their mines or lodes, and freeing the same from the flow of water therein, shall be what-

ever sum or sums of money, or stock, which may, or shall be agreed upon by and between the corporations, person or persons to be benefited as aforesaid; and the grantee herein, his associates, successors or assigns, and the said A. Sutro, and his associates, successors and assigns, shall have the right to receive and collect all sums of money, or stock which said persons, companies or corporations shall contract to pay; and in default of the payment of the same according to the tenor and condition of such contract or contracts, the said A. Sutro, and his associates, their successors or assigns, shall have the right, and are hereby authorized and empowered to sue for and collect the same in any court of competent jurisdiction in this state."

On the 25th day of July, 1866, an act of congress was approved, having the following title: "An act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada." Said last-named act is as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that, for the purpose of the construction of a deep draining and exploring tunnel to and beyond the 'Comstock lode,' so called, in the state of Nevada, the right of way is hereby granted to A. Sutro, his heirs and assigns, to run, construct and excavate a mining, draining and exploring tunnel; also to sink mining, working or air shafts along the line or course of said tunnel, and connecting with the same at any point which may hereafter be selected by the grantee herein, his heirs or assigns. The said tunnel shall be at least eight feet high and eight feet wide, and shall commence at some point to be selected by the grantee herein, his heirs or assigns, at the hills near Carson river, and within the boundaries of Lyon county, and extending from said initial point in a westerly direction seven miles, more or less, to and beyond said Comstock lode; and the said right of way shall extend northerly and southerly on the course of said lode, either within the same, or east or west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel.

"Sec. 2. And be it further enacted, that the right is hereby granted to the said A. Sutro, his heirs and assigns, to purchase, at one dollar and twenty-five cents per acre, a sufficient amount of public land near the mouth of said tunnel for the use of the same,

not exceeding two sections, and such land shall not be mineral land or in the bona fide possession of other persons who claim under any law of congress at the time of the passage of this act, and all minerals existing or which shall be discovered therein are excepted from this grant; that upon filing a plat of said land the secretary of the interior shall withdraw the same from sale, and upon payment for the same a patent shall issue. And the said A. Sutro, his heirs and assigns, are hereby granted the right to purchase, at five dollars per acre, such mineral veins and lodes within two thousand feet on each side of said tunnel as shall be cut, discovered, or developed by running and constructing the same, through its entire length, with all the dips, spurs and angles of such lodes, subject, however, to the provisions of this act, and to such legislation as congress may hereafter provide: provided, that the Comstock lode with its dips, spurs and angles, is excepted from this grant, and all other lodes, with their dips, spurs and angles, located within the said two thousand feet, and which are or may be, at the passage of this act, in the actual bona fide possession of other persons, are hereby excepted from such grant. And the lodes herein excepted, other than the Comstock lode, shall be withheld from sale by the United States; and if such lodes shall be abandoned or not worked, possessed, and held in conformity to existing mining rules, or such regulations as have been or may be prescribed by the legislature of Nevada, they shall become subject to such right of purchase by the grantee herein, his heirs or assigns.

"Sec. 3. And be it further enacted, that all persons, companies, or corporations owning claims or mines on said Comstock lode or any other lode drained, benefited or developed by said tunnel, shall hold their claims subject to the condition (which shall be expressed in any grant they may hereafter obtain from the United States) that they shall contribute and pay to the owners of said tunnel the same rate of charges for drainage or other benefits derived from said tunnel or its branches, as have been, or may hereafter be, named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode at the time of the passage of this act."

Under the grants, rights, franchises, and privileges of the said legislation, the waters in controversy were brought into and through the said tunnel; and the defendants are the successors in interest to said grants, rights, franchises, and privileges. At least, evidence tending to show the foregoing facts was introduced, and they must have been so found by

the trial court, and we see nothing in the record on file here to justify a disturbance of said finding.

Counsel for appellants, in their brief, say: "The testimony, without contradiction, shows that no water flows through the Sutro tunnel, except such water as is drained from the Comstock lode, or the country between its mouth and the Comstock lode, and such water as is pumped from below the level of the Sutro tunnel, and such water as is used on the Comstock lode for electrical purposes. The testimony further shows that the flow of water from the tunnel has never been uniform." Thus it may be seen that the waters get into the tunnel from three sources: (1) Draining of the land adjacent to the tunnel; (2) pumping from the mines into the tunnel; and (3) such as were discharged into the tunnel after being used in the machinery. The evidence further tends to show that the defendant company owns land from the mouth of the tunnel to the Carson river, over which the waters from the tunnel flow into said river. Plaintiffs claim one-half of all the waters flowing, and also one-half of all the waters that may hereafter flow, out of and from said tunnel, to quote from brief of appellant's counsel: "(1) By appropriation and use; (2) by prescription and adverse use; (3) by acquiescence in the use of the same." A question might arise whether the third claim mentioned does not negative and neutralize the second,—whether acquiescence does not negative and neutralize prescription and adverse use. "The user to give title must be adverse. It must be such a specific assertion of right as to expose the party to an action if as a matter of fact he had no right. It must not be in any way permissive. A license is a complete rebuttal to the presumption of an adverse user." 19 Am. & Eng. Enc. Law (1st Ed.) pp. 12-15, and authorities cited in notes. As the record stands in this case, this point need not be further discussed. Evidence for each of these contentions was put in by the plaintiffs and

evidence in opposition thereto was put in by the defendants. The evidence was conflicting. The district court must have found for the defendants on one or the other or both of these points. It must have found on the first point in defendants' favor, since, on the hearing of the order to defendants to show cause why they should not be enjoined and restrained from interfering with plaintiffs in their alleged right to use said waters, the court made the following order: "It is ordered that the said order to show cause be, and the same is hereby, vacated, and the injunction applied for refused." The evidence in the case being conflicting, this court would not be justified in reversing the case and setting aside said order; for, certainly, if the court found against the plaintiffs, on the facts involved, on all three of the contentions of plaintiffs, then no reversal could be properly had there; if on the second or third, or either of them, then, too, no reversal could be had; for, if the order of the court be right on any ground, then it should be affirmed, and this court cannot, from the record in this case, see what was the finding of the trial court on each of said contentions separately.

This would probably dispose of the case, but another and very important question was before the district court, and by it decided; and that question is now properly before this court, and we deem it proper that this court should render its decision thereon. The question is this: Are waters situated as are the waters in controversy here appropriable,—that is, subject to appropriation,—under the statutes and decisions of the courts of the state of Nevada? In the discussion of this question two questions arise: First. Is a stream formed of such waters a natural or an artificial and temporary stream? Second. If an artificial and temporary stream, are the waters thereof appropriable; that is, subject to appropriation?

In answer to the first question, we say we think such a stream is an artificial and temporary stream, and not a

natural stream. Certainly nature did not put such waters into and through the Sutro tunnel. The waters came therein and therethrough artificially, by means of the labor and appliances, at great expense of money and labor. We think it makes no material difference that the waters get into said tunnel from the sources above stated, to wit, percolation, pumping from the mines, and from the machinery used. When the waters get into the tunnel, they make an artificial and temporary stream.

In answer to the second question, we say we think waters situated as those above stated are not appropriable; that is, not subject to appropriation. Such waters are not like waters running in streams on the public domain of the United States. They are produced by the capital, labor, and enterprise of those developing them, and by such developing they become the property of those engaged in the enterprise. They are in the full and complete sense artificial and temporary streams. Certainly thus as to persons claiming such waters simply by using them; and there is no claim here by the government of the United States, the owners of the mines from which waters are pumped into the tunnel, or the owners of machinery by which or from which waters are passed into the tunnel. Should such claims ever be made, it could then be decided. It would be a question between those so claiming and the government of the United States, the mine owners, or the machinery owners, and the tunnel company. It cannot avail plaintiffs in this action. How could a right to such waters be gained by appropriation and use? Take the facts in this case. Said facts tend to show, and, the district court must have found, did show, that there were three periods in the history of said water: First, a period in which there was pumping of waters from the mines into the tunnel, and then considerable water ran from the tunnel; second, a long period of time (some eight or ten years, at least) in which there was no pumping, and then very little,

if any, water ran out of or flowed from the tunnel; and, third, another period, beginning in 1899, in which there was again pumping of waters from the mines into the tunnel, and then again considerable water ran out of and flowed from the tunnel. Suppose in the first period above named plaintiff did use water (say, for illustration, 100 inches, being one-half of the water in the tunnel), and in the second period that the waters diminished to nothing, or next to nothing; then he had nothing, or next to nothing, for eight or ten years. Again, suppose in 1899 1,000 inches of water came out of and flowed from the Sutro tunnel; how could his use of the 100 inches in the first period, or his use of nothing, or next to nothing, in the second period, or both of them, give him a right to the extra 900 inches of water in the third period? How could he use what was not in existence? How could he appropriate, make property of, make his own, that which did not exist? Appropriation of water means making property of it by use,—making it one's own by use,—and a thing cannot be used until it comes into existence. Hence, if it could be held that plaintiffs gained anything during the first or second period, that would not avail them during the third period. The best that could be claimed would be what they gained during the first or second period, and there was no attempt to show how much that was. Again, if they gained anything during the first period, they probably lost it all during the long second period. One further illustration: A. by artificial means fills a tank or reservoir on his own land today, and permits the waters to flow down to B.'s land and irrigate B.'s land. Probably A.'s conduct gives to B. the right to that water,—that individual tank or reservoir full. But suppose A. fills the same tank or reservoir tomorrow, but chooses to use this water—this tank or reservoir full—to irrigate his own land; what right has B. to this last water? We think none, and it makes no material difference if such a state of things were kept up for a long

number of years. In such case time would raise no presumption of a grant, and A. could at any time stop the production of such artificial and temporary stream; and he could also at any time, if he continued the production of such stream, put the waters thereof to his own use. The following authorities sustain and illustrate this doctrine: *Mosier v. Caldwell*, 7 Nev. 363; *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; *Irrigation Co. v. Michaelson* (Utah) 51 L. R. A. 280, and authorities cited in note (s. c. 60 Pac. 943); *Kin. Irr.* p. 474, § 297; *Id.* p. 478, § 298; *Gould, Waters* (2d Ed.) p. 445, § 225; *Id.* p. 537, § 279; *Id.* p. 634, § 352; *Id.* p. 62, § 34; *Id.* § 280; *Crescent M. Co. v. Silver King M. Co.* (Utah) 54 Pac. 244, 70 Am. St. Rep. 810; *Arkwright v. Gell*, 5. Mees. & W. 203; *Greatrex v. Hayward*, 8 Exch. 291; *Hargrave v. Cook*, (Cal.) 41 Pac. 18-20, 30 L. R. A. 390; *Railroad Co. v. Dufour*, (Cal.) 30 Pac. 783, 19 L. R. A. 92; *Hanson v. McCue*, 42 Cal. 307, 10 Am. Rep. 299; *Barnes v. Sabron*, 10 Nev. 217; *Godd. Easem.* pp. 243, 247.

The order of the district court vacating the order to show cause and refusing an injunction is affirmed.

PER CURIAM: Rehearing denied.

THE REINECKE COAL MINING CO. v. WOOD, ET AL.

(112 Federal 477. U. S. Circuit Court, Western District of Kentucky.
Dec. 23, 1901.)

Denial of previous like application by state court. An order of a state court refusing a preliminary injunction in a suit brought by a number of corporations jointly, in which no final judgment has been rendered, is not a bar to a subsequent suit in a federal court for an injunction by a successor to one of such corporations, which was not a party to the former suit, and against defendants for the most part different, and where the acts alleged as grounds for relief were committed after the former order was entered, although they are of the same general character as those relied on in the state court.

¹Restraining armed camps of labor unions. At the instance of coal miners in Indiana and Illinois who were members of the organization known as the United Mine Workers, such organization undertook to secure the adoption of a certain scale of wages, which it had fixed, in the mines of Kentucky. Certain of the operators there, who employed union miners, agreed to adopt such scale, provided it was also adopted in a majority of the mines in another mining district of the state, in which the miners were nonunion men. The relations between the latter and their employers were harmonious, and the wages paid satisfactory; and, for the most part, they did not desire to join the union. Under such circumstances, defendants and others, representing the miners' organization, invaded the district in large force, and established camps of armed men near the mines, for the purpose of threatening and compelling the miners therein to join the union by a display of force, and of compelling a strike unless the union scale of wages was adopted. These camps were maintained for many months, the occupants threatening and even assaulting miners who refused to

¹*U. S. v. Haggerty*, 116 Fed. 510. *U. S. v. Gehr*, Id. 520. *Castner v. Pocahontas Co.* 117 Fed. 184. *Coeur d'Alene Co. v. Miners' Union*, 51 Fed. 260.

Threat to shut a mine down is not intimidating workmen. *State v. Jenkins*, 90 Tenn. 580; 18 S. W. 249.

Strike excuses R. R. from furnishing cars. *Louisville Co. v. Queen City Co.* 18 Ky. L. R. 126; 35 S. W. 626.

Interference with property held by receiver by strikers. *U. S. v. Weber*, 114 Fed. 950.

join the union. Both employers and miners resented such actions, and took measures of defense and retaliation; the result being conflicts and acts of violence. *Held*, that the acts of defendants and their associates in establishing and maintaining such camps constituted an unlawful invasion of the rights of both mine owners and miners, which resulted in and threatened irreparable injury, and that it was the duty of a court to enjoin the same on application by a mine owner affected.

In Equity. On motion for preliminary injunction.

HELM, BRUCE & HELM and GORDON & GORDON, for complainant.

W. H. YOST, R. Y. THOMAS, JR., and EVERETT JENNINGS, for defendants.

EVANS, District Judge. The complainant corporation, a citizen of the state of Delaware, which owns and operates a large coal mine in Hopkins county, Ky., on November 12, 1901, exhibited its bill of complaint against certain persons belonging to an association known as the United Mine Workers of America; some of the defendants being officers of a section of that organization. The organization is a labor union association, and the bill complains of certain acts of the defendants by which it is alleged that the property of the complainant is threatened with great and irreparable injury, and seeks such relief as it may be in the power of the court

A coal selling company having contracts with the owners of coal mines for delivery of all their coal has such an interest as makes it a proper party to file a bill against striking miners. *Carroll v. Chesapeake Co.* 124 Fed. 305.

Judicial notice of extensive strikes as "part of the history of the times." *Cottrell v. Smokeless F. Co.*, 129 Fed. 174.

The strike clause suspends the operation of a coal delivery contract and vendor is not liable for failure to deliver coal during the strike. *Id.*

But it does not extend the time on a time limited contract. *Hull O. Co. v. Empire Co.* 113 Fed. 256.

to give. Upon the institution of the action a temporary restraining order was granted by the judge, and the pending motion was subsequently made for an injunction pendente lite according to the prayer of the bill. By certain parts of the answer of the defendants, as amended, that motion is opposed upon the ground that the Reinecke Coal Company, a Kentucky corporation, which owned the mining property of the complainant up to the 6th day of November, 1901, and which on or about that day transferred all its property to the complainant, was the only person wronged, if any one was, by the alleged acts of the defendants, and that none of those acts in any way affected the complainant, but only its predecessor in the ownership of the property. It is, indeed, quite true that the defendants should not be enjoined if their acts were only directed against another person than the complainant, and especially if the complainant is threatened with no injurious result from the conduct of the defendants. But the court finds from the evidence submitted to it that, while the history of the transactions in the course of which the troubles complained of arose shows that the old company was the one aimed at, yet it also shows that the result sought by the defendants cannot be accomplished without pursuing the same course towards the complainant; and the court finds from the evidence that, up to the time of the filing of the bill of complaint and the issuance of the restraining order in this case, there was no cessation of the efforts of the defendants to accomplish their designs, and that these efforts were directed against the complainant after its purchase of the mining property, and, further, that the armed camp of the defendants near complainant's mines was maintained until the restraining order was served, after which the armed persons composing that camp, in great numbers, moved upon a neighboring coal mine in Webster county, and that that movement was attended with deplorable re-

sults, which otherwise might have been inflicted upon the complainant. This is sufficient to dispose of the defendants' first objection.

A second objection made by the defendants is based upon the averment in the answer as amended to the effect, substantially, that the complainant in an action in equity brought by it in the state court in Hopkins county on the 8th day of May, 1901, sought, but was refused, an injunction by that court; it being claimed that the cause of action asserted in that case was the same as that asserted in the pending action. This, it is contended, was a judgment against the right of the complainant, which bars the granting of the injunction now prayed for. This contention is entirely without legal force or merit, for several distinct reasons, among which are: First, the fact that that suit, as shown by the copy of the record filed, was not brought by the complainant at all, but was brought by the St. Bernard Coal Company, the Reinecke Coal Company, and the Monarch Coal Company, jointly, each of which was an entity entirely different from the complainant; second, the record shows that the defendants in that case were different in most respects from the defendants in this case; third, the plaintiffs in the proceeding, so far as it was passed upon, sought a provisional remedy, only, under the Code of Practice, against the defendants in that suit, and the claim thereto was based upon grounds which differ materially from those alleged in this suit; fourth, the order refusing the temporary injunction in that case was not made as a final judgment by the court, but the provisional remedy of a temporary injunction was refused by the judge, and no final judgment appears to have been entered in the case on the merits; fifth, that action, while judicial in character, was taken in a cause to which the complainant was not a party, and, for the most part, against persons other than the defendants in this case, and manifestly upon grounds materially different from those asserted here; sixth,

the preliminary refusal by the judges thus acting of merely provisional relief, upon one state of facts, and between different parties, would not prevent the granting of the pending motion, affecting different parties, and upon another and substantially different state of fact; seventh, the refusal of an injunction to the Reinecke Coal Company to restrain acts directed against that company alone, or jointly with others, would not affect the right of the complainant to the relief sought against acts directed against it, especially when those acts occurred after its purchase of the property of the older corporation; and, eighth, to be a bar, there must have been a judgment, in the technical sense, and in a suit to which the complainant was either a party, or to the judgment in which he was privy.

The trouble in the coal mining region in Hopkins, Webster, and Christian counties, and which, for convenience, will hereinafter be called the "Hopkins County District," and which have obtained such wide and unwholesome notoriety, arose some 18 months ago, out of a state of facts which is briefly as follows: Certain miners in Indiana and Illinois, belonging to labor unions there, complained that certain miners belonging to similar associations in Kentucky were not being paid wages according to a scale fixed in Indianapolis, and that therefore there was great danger that they could not themselves maintain that scale. This complaint resulted in the conception of a plan and purpose to remedy what they considered an unsatisfactory condition of things. Agents were thereupon sent to certain parts of Kentucky to bring about an increase of the pay of the miners there. As a result of this, an agreement was reached with the operators at certain localities—notably, at Central City—who employed laborers belonging to the union, and these operators consented to advance their scale of wages upon condition that a certain per cent of the operators in the western Kentucky coal fields would do the like; and this agreement has probably been one

of the most fruitful sources of all subsequent troubles, all of which grew out of the attempts of the United Mine Workers to coerce the consent of the necessary percentage of the other operators to put in force the agreement made at Central City. In the Hopkins county district large mines were being very successfully conducted with nonunion labor, and both employers and employés were not only prospering, but were mutually entirely satisfied. In order to carry into effect the agreement referred to, it was thought essential to disrupt those cordial and satisfactory relations between the nonunion laborers and their employers in the Hopkins county district, and by compelling the former to join the association of United Mine Workers the latter would be forced to yield to the Indianapolis scale of prices, and thus effectuate the agreement made by the union miners with the operators at Central City and elsewhere in the western Kentucky coal fields. In order to compel (for that is not too strong a word) the miners in the Hopkins county district to join the United Mine Workers, and the operators there to consent to their so doing, and thus bring about the adoption and secure the maintenance of the Indianapolis scale of wages, which neither the employers nor employés in the Hopkins county district desired, and which was probably not suitable to the conditions there, the United Mine Workers, and particularly the defendants, invaded the Hopkins county district in large force, and, having formed an armed camp, occasionally sallied forth to threaten and sometimes to do much worse to, persons who refused to join their organization, and to those who refused to employ laborers who did join it. This conduct upon their part naturally superinduced measures of defense and retaliation upon the other side, and there has resulted from these circumstances and conditions the very remarkable state of affairs to which reference has been made,—a condition of things which has certainly brought discredit upon the state. To tolerate such a condition is to encourage

it, and, without hesitation, the judge of this court granted the restraining order when it was asked in this case; and one gratifying thing disclosed by the evidence offered on this motion is that much good has probably resulted from that action, although it did not prevent the assault by the United Mine Workers upon property and citizens in Webster county immediately afterwards.

A great number of affidavits were filed at the hearing, and have been read; and, while much very positive conflict of statement has been found in them, enough appears to warrant the conclusion that, as a direct result of their agreement with the Central City operators and others, the United Mine Workers organization determined to make what is somewhat remarkably called a "striking district" out of that portion of the territory of Hopkins, Christian, and Webster counties where coal mining is carried on, and to force the operators there to yield to their demands by means of the terror inspired by the tactics adopted and tenaciously pursued, of having a large force encamped in the immediate neighborhood of the mines in that territory, and, by the feelings to be thus excited and the terror to be thus inspired, to compel nonunion labor employed there to join the United Mine Workers, and thereafter to strike if the Indianapolis scale of prices was not adopted by their employers. There was no strike then or since pending at any of the mines in the Hopkins county district. There appears to have been little or no discontent among the laborers employed there. The scale of prices under which they were working was satisfactory to most, if not all, of them, and to those who employed and paid them. They did not at that time, in any large numbers, appear to desire to join any union, and the subsequent presence of the armed camp could in no way benefit them. The whole scheme was to benefit another certain class of miners, not resident in that district, and who worked elsewhere, by forcing the operators in the Hopkins county

district to do what neither themselves nor their employés desired to do. If we agree that the mine owners in what we may briefly call the "Central City District" were not particeps criminis to all the troubles in the Hopkins county district, and responsible equally with their co-contractors for the results of the encampments and of the armed and unlawful operations there, we must nevertheless conclude that their contract with the labor unions, to which we have referred, was the direct cause of the invasion of that district, and the terrorizing attempt made there to put that agreement into effective operation; they in the meantime being exempt alike from similar assaults and from the Indianapolis scale of wages. As before stated, there was little or no discontent in the Hopkins county district. There was no request nor desire, so far as the evidence shows, for the aid of the labor association known as the United Mine Workers. On the contrary, it was undesired and vigorously repelled both by the employers and a vast majority of the employés. Nevertheless the defendants and those associated with them determined to bring these unwilling persons to the terms the defendants desired to dictate, and, with that sole object in view, organized the armed camp near Madisonville, and one near complainants' mines, and in this way sought to accomplish their own selfish objects at any cost. This, as already intimated, was mostly done before the complainant owned its property, but the object was not accomplished, and the effort was continued in the same way and by the same means until this suit was actually brought. It cannot be that this course was not meant to be an attempt to compel the complainant, by force and intimidation, to yield to the defendants' wishes and demands. The encampment of armed men in the vicinity of the mines was not meant for gentle persuasion or peaceable argument. Peaceable and argumentative persuasion is entirely admissible, but is not accomplished nor intended to be accomplished in that manner. The con-

duct of the defendants, on the contrary, had all the elements of terror and intimidation; and those elements, being intentionally present, were indubitably designed to compel the complainant to accede to demands it had the lawful right to decline or reject at its option. A court cannot shut its eyes to propositions so palpable. The right to employ whom one wishes, the correlative right to hire to whom one pleases, for wages satisfactory to both, and the right of the same parties to abandon or dissolve the relations thus assumed, are undeniable. The right of each party to strive to obtain the terms most beneficial to himself, and the right of a number of persons similarly situated to unite to accomplish such ends, must be admitted by all. And it follows as a resultant from the latter proposition that individuals having similar interests may by all peaceable and argumentative means persuade others to join with them in their efforts to do what they fairly consider to be beneficial to themselves as a class, but the safety and preservation of these great and inestimable rights in a free country depend in no small degree upon their recognition and upon their being respected by all persons alike. They are rights which belong to all in common, and not to one class only. The employer and the employé, in whatever business they may be engaged, either in plain merchandising or farming, or in conducting the most extensive manufacturing or other business, must have rights which are equal; and both sides must understand, must respect, and must act upon that principle whenever it applies. When either side to a contention over diverse interests of this character can, by superior force or other means of intimidation, compel the other side to such controversy to yield to its demands, anarchy and oppression have begun, and there is no assurance that in the next encounter the other side may not be the victors, and thus might and force and power, instead of just legal principles, may dictate the standard of right to which all must conform. The only course

that is safe for all—the few or the many, the weak or the powerful—is rigorously to require that each party to all such controversies shall recognize the equal rights of all. It is the duty of the courts, upon all proper occasions, to see that this is done, and to apply these principles in all cases that come before them. With this rule as a guide, there is no difficulty in solving the problem presented by the record in this case. The employer and (in the main) the employes in this instance were alike content. They must be presumed to have understood their own condition and needs, and what was best for themselves; and they were not required to subordinate their interests or their wishes to those of miners in distant localities or states, where what might be entirely different conditions would make the Indianapolis scale of wages more equitable and proper for those who desired to adopt it. They had the right to be left free to pursue their own course about matters exclusively of their own concern. The agreement between the laborer and the employer was one which it was the mutual right of both to make, and one which constituted a material and valuable interest in both, and one in which they had the right not to be disturbed by persons who clearly had no right to do so either by force, or by the appearance of force, nor by any threats or other forms of intimidation. This right thus possessed was a valuable property right,—valuable to the laborer, but none the less so to the employer. The intrusion of the defendants, so long as mere peaceful argument and persuasion were used, was in no way violative of the rights of the complainant; but, when that persuasion took the form of the multitudinous camp and the gun and the pistol and the armed force, it passed the bounds of legal right, and entitled the complainant to its lawful remedies against it, quite as much, to say the least, as “picketing,” or “besetting,” which are held to be a nuisance, and suppressible as such. If picketing may be so treated, then a fortiori the conduct of the defendants

should be prohibited. If this court cannot, in a case like this, protect the rights of a citizen when assailed as those of the complainant have been in this instance, there is a decrepitude in judicial power which would be mortifying to every thoughtful man. It is conceived that there is no such impotency, and there should be no lack of promptness in exercising in the premises all the power the court possesses. Quite true it may be that the exertion of executive power would be more desirable in cases like this, but that abstract proposition in no wise exempts the court from the duty of protecting the rights of the litigant when a proper case is presented. It has not been deemed useful to cite authorities in support of principles so well settled as those upon which the court must proceed in this case, but it may be well to mention the cases of *In re Debs*, 158 U. S. 564, and *Quinn v. Leathman*, [1901] App. Cas. 495, as covering the whole ground.

As already intimated, the court has not failed to notice the extreme conflict in the testimony presented by the respective sides, and an attempt to reconcile those conflicts would obviously be unavailing. It may not be inappropriate, however, to say that the statement so positively made in the affidavit of one of the chief officers of the local association of United Mine Workers to the effect that Henry Taylor was murdered in cold blood is so palpably refuted and shown to be so utterly false by the record, and by the court of appeals in its decision in the proceedings which resulted from that unfortunate event, that discredit is thrown upon the equally positive statements made in the other affidavits. A careful consideration of the testimony leaves the court in no doubt that the averments of the bill are substantially true, and, this being so, the motion for the injunction pendente lite will be sustained, in order to prevent great and probably irreparable injury. The testimony also leaves upon the mind of the court, as before stated, the pleasurable assurance that

the temporary restraining order has been productive of good ; and, if this be so, the court should hesitate to do anything to destroy or impair that beneficial result.

The motion for an injunction pendente lite according to the prayer of the bill is sustained, and counsel will prepare and submit proper orders to that effect.

WILLIAM HAYNES ET AL V. GEORGE C. BRISCOE.

(29 Colorado 137; 67 Pac. 156. Supreme Court. Dec. 24, 1901.)

Newspaper nearest the claim. The "usual traveled route" is not the test by which to distinguish which is the newspaper published nearest the claim. Steele, J.

Mailing copy of the paper containing the printed forfeiture notice to the co-owner is not a service of notice under the act. Steele, J.

A notice of forfeiture on two claims is fatally defective where "it does not specify the amount of money spent on each claim nor the facts which might excuse expenditure upon each claim."

Appeal from the District Court of Gunnison County.

DEXTER T. SAPP, for appellants.

T. J. O'DONNELL, MILTON SMITH and S. D. CRUMP, for appellee.

MR. JUSTICE STEELE, delivered the opinion of the court.

The title to two mining claims, the Bull Domingo and the Bull Domingo No. 2, is involved in this controversy. George Cole Briscoe, the plaintiff, owned sixty-four ninetieths of the claims, and in 1896 conveyed to his co-owner Haynes nineteen ninetieths in payment, so he alleges in his complaint, for assessment work done on the claims by Haynes for the year 1895, and to be done for the year 1896. In January, 1897, Haynes causes to be published in the Pitkin Miner, a newspaper published at the town of Pitkin, a notice of forfeiture because of the alleged failure of Briscoe to contribute his proportion of the expenditures upon the claims for the year 1896; and during the month of August, 1897, the notice and proof of publication, together with an affidavit

As to what amounts to sufficient publication, see *Elder v. Horse-shoe Co.* 21 M. R. 510.

of Haynes, were recorded in Gunnison county. Haynes having on July 31, 1897, conveyed to the defendants Perreault, McManes and Roff, undivided interests in the claims, they all joined in a lease to the defendant Hallet, a copy of which is set forth in the complaint. The plaintiff, in the complaint, alleges on information and belief that Haynes did not perform the work upon the claims in 1896 or at any time prior to the publication of the notice, and that Haynes, Perreault, McManes, and Roff conspired to cheat and defraud plaintiff of his interest in the claims. The plaintiff further alleges that the said Pitkin Miner was not the newspaper published nearest to said mining claims, and was not a paper in which said notice of forfeiture could legally be published and that there were other newspapers published nearer the claims than the said Pitkin Miner.

The defendants in their answer, deny the agreement alleged between the plaintiff and the defendant Haynes; allege that Haynes did the assessment work upon the claims for the year 1896, but deny that the work was done for or in behalf of plaintiff; deny a conspiracy; deny that there were newspapers published nearer the claims than the Pitkin Miner. The other allegations of the complaint material to a decision are admitted.

The cause was tried by the court, and judgment rendered for the plaintiff. The defendants, except Hallet and the bank, have perfected an appeal to this court.

Upon the trial, the court required the defendant to assume the burden of proof. The defendant offered to show "that the Pitkin Miner was the nearest paper to the property in question, by the usual traveled route." This offer was refused; the court holding that the newspaper nearest the claim "by the usual traveled route," was not the newspaper, within the meaning of the statute, in which the publication should be made. The defendant then offered to show that copies of the newspaper in which the forfeiture notice was

published were mailed to the plaintiff and received by him after the time of the first publication. This offer was also refused. The defendant then rested. The plaintiff then called one witness, interrogated him in reference to money deposited in bank as royalty and the case was then closed. The court thereupon rendered judgment in favor of the plaintiff.

The assignments of error principally discussed are those relating to the rulings of the court in requiring the defendants to prove the regularity of the proceedings taken by them to forfeit the interest of Briscoe in the claims, and the ruling of the court in construing United States Revised Statutes, section 2324.

The defendants admit in their answer that prior to 1896, the title to the claims was as alleged in the complaint, and "that said William Haynes has at all times, since the 30th day of July, 1897, asserted and claimed and now claims, that the plaintiff has forfeited all his interest in said mining claims and each of them." By these admissions in the pleadings, it is apparent that they rely upon the regularity of the forfeiture to defeat the plaintiff, and that their title to the claims depends upon the legality of the proceedings by which the plaintiff's interest was sought to be forfeited to the defendant Haynes. Under these conditions the burden of proof was properly declared to be upon the defendants to establish by a preponderance of the evidence that the interest of the plaintiff in the claims in question was regularly and legally forfeited to the defendant Haynes for failure of plaintiff to pay his proportionate share of the work performed during the year 1896. *Hall v. Kearney*, 18 Colo. 505; *Johnson v. Young*, 18 Colo. 625.

Upon this branch of the case my associates do not express an opinion, but base the judgment of affirmance upon the matters stated hereafter.

These claims are located on Italian mountain, in Gunnison

county, and the plaintiff alleged in his complaint that the notice published in the Pitkin Miner was not notice to him, because the statute requires the notice to be published "in the newspaper nearest the claim." Haynes testified that the distance from the claims, by "the usual traveled route," to Pitkin, where the notice was published, is about forty-one miles, and that by the usual traveled route it was about one hundred miles from the claim, to Crested Butte. "You would have to go to Pitkin and from Pitkin to Gunnison, and from Gunnison to Crested Butte," said the witness.

The defendant sought to establish the fact that during the winter and spring of 1897 the nearest place "by the usual traveled route" was Pitkin. The court correctly held, however, that the season of the year cannot be a factor in determining the question, and that unless the newspaper at Pitkin was the nearest, irrespective of the season or of the condition of the weather, it was not the nearest newspaper within the meaning of the statute. No decision has been cited construing the words of this statute. There are numerous decisions of the secretary of the interior construing the statute requiring publication of application for patent, but we think the two sections are entirely different. The section now under consideration requires that publication be made in "a newspaper published nearest the claim." In the section under consideration by the secretary of the interior in the cases cited, the statute requires publication by the register, "in a newspaper to be by him designated as published nearest to such claim."

The defendant offered to show that copies of the newspaper were sent to the plaintiff. The court properly refused the offer. The notice must be by publication or by personal service, and personal service cannot be had by sending through the mail a copy of the newspaper in which the notice is published; and proving that the person to whom the notice is directed received the paper is not sufficient.

The act of congress authorizing the procedure whereby the property of the co-owner is forfeited must be strictly construed; and the defendants, upon whom was the burden of proof, having failed to show that the Pitkin Miner was the newspaper "published nearest to the claim," it follows that the service and subsequent acts were void, and that the plaintiff is the owner of an undivided on-half of the Bull Domingo and Bull Domingo No. 2 claims and entitled to possession.

In this construction of the statute my associates do not concur. They are of the opinion that the notice itself is fatally defective, in that it does not specify the amount of money spent upon each claim nor the facts which might excuse expenditure upon each claim. All the members of the court agree that the case should be affirmed. My associates do not place upon the statute a different construction than that mentioned in the opinion, but base their judgment of affirmance upon the grounds mentioned. I do not insist that the notice is sufficient, but think the judgment should be affirmed upon the theory adopted by the trial court.

The judgment of the district court is affirmed.

Affirmed.

FAIRPLAY HYDRAULIC MINING CO. v. WILLIAM E. WESTON.

(29 Colorado 125; 67 Pac. 160. Supreme Court. December 24, 1901.)

Irrigation ditch below placer dump. No vested rights by mere license.

Where plaintiff's grantors entered on the placer ground of defendants, on which the waters of a stream were then being used for placer mining purposes, and without the knowledge or consent of defendants constructed a ditch which diverted water after it had passed over the placer flume, but before it returned to the creek, and defendants acquiesced in the diversion, the grantor acquired only the rights of a licensee, and plaintiff could not enjoin the pollution of the stream by the turning of another body of water into it.

Appeal from the District Court of Park County.

Abandoned water returned to natural stream becomes parcel of the waters of the channel. *Schulz v. Sweeney*, 19 Nev. 359; 11 Pac. 253.

After user by placer miner it must be let go to claims below. *Alder Co. v. Hayes*, 6 Mont. 31; 9 Pac. 581.

Appropriator of water cannot change place of use to damage of lower appropriator. *Last Chance M. Co. v. Bunker Hill Co.* 17 M. R. 449.

The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with undefined and unknown courses and banks. *Crescent Co. v. Silver King Co.* 17 Utah 444; 54 Pac. 244.

Known underground streams flowing in well defined channels are subject to appropriation and cannot thereafter be diverted by the wrongful act of another. *Whitmore v. Utah Co.* 26 Utah 488; 73 Pac. 764.

A party contracting to furnish water to a placer mine must furnish water fit for the purpose and if the water furnished has come from a placer above, the duty is upon him to provide the necessary reservoirs to settle it. *Gold Ridge Co. v. Tallmadge*, 44 Oreg. 34; 74 Pac. 325.

Using such water as furnished was no waiver of damages for its defects. *Id.*

The congressional recognition of water rights, R. S. § 2339, does not create rights but is a recognition of a pre-existing condition. The claimant has no contract relation with the state or federal government. *Mohl v. Lamar Co.* 128 Fed. 776.

The action prosecuted by appellee, as plaintiff, was to enjoin appellant as defendant, from so polluting the water of Beaver Creek, claimed by plaintiff for the purposes of irrigation, as to render it unfit for that use, or thereby injure the ditch through which such water was conducted. Plaintiff obtained a judgment requiring the defendant to permit the water claimed by him to pass to the headgate of this ditch in good and suitable condition for irrigation purposes, and enjoining it from doing or permitting any act to the contrary which would result in injury to the ditch, or materially impair the quality of the water for irrigation purposes. From this judgment the defendant brings the case here for review on appeal. The material facts and testimony appear in the opinion.

OSCAR REUTER, and AUGUST PEASE, for appellant.

CHARLES A. WILKIN, for appellee.

MR. JUSTICE GABBERT delivered the opinion of the court.

Defendant is the owner of an appropriation of the waters of Beaver creek for placer mining purposes, which antedates the initiation of any rights to which plaintiff has succeeded to the use of water from that source. In 1882 the party through whom plaintiff derives title to the appropriation under which he claims, entered upon the placer ground of the grantors of appellant on which the waters of the stream were then being used for placer mining purposes, and without the knowledge or consent of the then owners of such ground, constructed a ditch which diverted water after it passed through the placer flumes and over the placer dump, but before it returned to the channel of the creek. While this action appears to have been acquiesced in by the then owners, there is evidence directly to the effect that the parties so

taking the water should never assert a legal claim or right thereto, nor should his use of such water interfere with the operation of the placer. There is no testimony to the contrary. The most that can be claimed on the part of plaintiff is, that the owners of the placer acquiesced in the construction of the ditch and the division of water after it had been used for placer purposes. The original headgate of the ditch was immediately below the placer dump. It was maintained there for several years, and then moved several hundred feet northeasterly. This change was occasioned by a change in the place of placer washing, which prevented the water from passing down where it did when the ditch was first constructed. In 1891 the parties interested in the placer completed a ditch by means of which a large volume of water was turned into Beaver from Mosquito creek. This additional water was used in the placer mining. This, it is claimed on the part of plaintiff, so fouls the water at the point where he diverts the flow through his ditch as to render it unfit for the purposes of irrigation. It is also claimed on his behalf that prior to the diversion of water from Mosquito creek the water which he was wont to divert was not so polluted. It may be conceded, for the purpose of this case, that such is the fact.

The theory of the complaint is that the grantor of plaintiff made a valid appropriation of the waters of Beaver creek without any limitation whatever, upon the rights so claimed to have been acquired. The trial court so found and concluded, and upon this theory rendered the judgment of which appellant complains. Whether or not the judgment given is correct, if the claim of plaintiff had been established, is not a question which we are required to determine. Without attempting to indicate what rights are vested in him to the use of the water of the stream for the purposes of irrigation, we shall base our decision solely on the one question of whether or not, in the circumstances of this case, plaintiff

is entitled to the relief demanded. For the purposes of this case the very most that can be claimed on behalf of plaintiff is, that he is the licensee of appellant. The right of his grantor who initiated a use of the water which he now claims the appellant has wrongfully fouled, was to water which the predecessors of appellant had first used for placer mining purposes but before it reached the channel of the stream. He took the water after thus applied by constructing a ditch upon the mining premises. The then owners of these premises and the parties then lawfully using the water for mining purposes, as well as appellant, acquiesced in these acts. This does not impose upon appellant any such obligation as plaintiff now seeks to burden it with. It was patent to the grantor of plaintiff that the water he sought to divert was liable to be fouled when utilized for the purpose for which it had been appropriated, and that any structures which he would erect below the placer dumps to divert such water might be injured, or even rendered useless by the same means. Mere acquiescence on the part of the placer owners in these acts imposed upon them no obligation to continue to flow water in a given place, or of a given quality or quantity for the use of plaintiff, or of his grantor. Appellee has only succeeded to the rights of a bare licensee, and whatever they may be, he can only exercise them subject to those existing in the appellant to the use of the water and premises for the purposes for which they were appropriated, and subject to the results naturally caused by such use. A bare licensee goes upon premises at his own risk, must take them as he finds them, and accepts the permission thus granted with its concomitant conditions and perils. *Redigan v. Boston & M. R. Co.* 155 Mass. 44; 31 Am. St. Rep. 520.

A license of the character under consideration will be strictly construed. *Carleton v. Redington*, 21 N. H. 291.

It is also proper to consider the circumstances in which such a license was given if a doubt arises as to the rights

of the parties thereunder. *Brown v. Brown*, 30 N. Y. 519.

In the absence of testimony it will not be presumed that the grantors of the defendant ever intended to vest a right in a licensee of that scope which, if asserted, would be practically destructive of their own estate. In addition, we have the undisputed testimony of the party who discussed the situation with the grantor of plaintiff, to the effect that the permission granted to take the water from below the placer dump was upon condition that it should not ripen into a right, or the use of such water interfere with the operation of the placer.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment that plaintiff take nothing as prayed in his complaint, and dismiss the action.

Judgment reversed.

**McKINLEY CREEK MINING COMPANY v. ALASKA UNITED
MINING COMPANY.**

(183 U. S. 563; 22 Sup. Ct. 84. Supreme Court. Jan. 6, 1902.)

No error on advisory verdict. Assignments of error based upon the refusal of instructions in a suit in equity in which the verdict is only advisory to the court cannot be entertained on appeal.

A finding by the court on a question of fact upon which the evidence is conflicting cannot be rejected on appeal.

¹Sufficient description of placer location. A sufficient location of placer mining claims is made by notices upon a stump in a creek, of a claim running 1,500 feet along the creek bottom and extending 300 feet each way from the center of the creek, adding that it is an extension of another claim named, a certain distance from the first falls on said creek.

The location of a mining claim by an alien, and the rights following therefrom, are voidable, not void, and are free from attack by anyone except the government.

Appeal from the District Court of the United States for the District of Alaska.

Appeal from a judgment entered on a verdict for the plaintiffs in an equity case to establish title to placer mining claims. *Affirmed.*

This is a bill in equity brought by the appellee company,

¹Failure to mark boundaries invalidates location. *Anthony v. Jillson*, 16 M. R. 26.

Lands located and used as a placer, also used as residence and pasture, may be selected as homestead. So held in contest between the owner under either title and his creditors. *Gaylord v. Place*, 98 Cal. 472; 33 Pac. 484.

The amended location certificate statute applies to placers as well as lodes. *Kirk v. Meldrum*, 21 M. R. 393.

Proof of ownership in a placer claim does not prove ownership in the water used on the claim. *Leggat v. Carroll*, — Mont. —; 76 Pac. 805.

who was plaintiff below, to establish title to two placer mining claims, against a like claim of appellant company to the same ground.

The bill alleged that:

"Peter Hall, William A. Chisholm, James Hansen, John Dalton, and Dan. Sutherland, partners under the firm name and style of the Alaska United Mining Company, bring this their bill of complaint against C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Chas. P. Leitch, and C. P. Cahoon, partners under the firm name of the McKinley Creek Mining Company, and show to the court that the said parties, both plaintiffs and defendants, are citizens of the United States and residents of the district of Alaska."

The bill also alleged ownership of the claims by reason of location, exploration, and discovery of precious metals, and the compliance with the local rules and regulations of the mining district. Also possession of the claims and the erection of valuable improvements thereon, and forcible entry upon that possession by defendants (appellants) with an attempt and avowed purpose to drive plaintiffs (appellees) therefrom, and unless restrained they would proceed to the execution of said threats. An injunction was prayed for.

The defendants admitted their citizenship, but denied the citizenship of plaintiffs on the ground that the defendant had not sufficient knowledge to form a belief thereto, and traversed in like manner or absolutely the other allegations of the bill, and alleged title by reason of prior discovery by members of the company. The answer also alleged prior possession by members of the company, from which they were dispossessed by the plaintiff, and claimed that as to the controversies thus arising:

"Defendants are under the law and practice of this court entitled to a jury trial for the trial of the title to said claims and each of them, and to that end and purpose have commenced in this honorable court a suit in ejectment for the trial and determination of the

title to said property in an action at law and according to the usage and practice of this court, and until the trial and determination of such trial at law by this honorable court the defendants are entitled to a restraining order against said plaintiff company and its individual members restraining them and each of them from the commission of the wrongful acts herein complained of."

A temporary injunction was prayed against plaintiffs (appellees).

There was a reply filed to the new matter of the answer and to the cross complaint.

A jury was impaneled to try the case on motion of plaintiffs, no objection being made by defendants, and, after hearing the evidence and receiving instructions from the court, the jury rendered a verdict for plaintiffs, as follows:

"We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, Wm. A. Chisholm, Dan. Sutherland, James Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy."

The defendants in due time moved for judgment notwithstanding the verdict, upon the ground that on the evidence the defendants were entitled "to a judgment in their favor for the possession of the mines and property in controversy." The motion was denied.

Subsequently defendants moved for a new trial (1) upon the testimony in the cause, the rulings therein and exceptions taken, and upon the pleadings and proceedings in cause No. 967; (2) the insufficiency of the evidence to justify the verdict; (3) error in refusing to give certain instructions requested by defendants (appellants).

The motion was denied, and the following judgment was entered:

"This cause came on to be heard at this term upon the bill, the answer and cross bill of defendants, and the replication thereto of plaintiffs, and the proofs in the case, and upon the request of de-

McKINLEY CREEK M. Co. v. ALASKA UNITED M. Co. 733

defendants, duly made by their counsel, Messrs. Winn & Weldon, the issues arising upon said pleadings and proofs were submitted to a jury of good and lawful men, duly selected, impaneled, and sworn, to wit, J. Montgomery Davis and eleven others, who, having heard the said proofs adduced in the case, and having been instructed by the court as to the law, and having heard the argument of counsel, retired in charge of the bailiff to consider of their verdict, and after due deliberation had returned into open court the following verdict, to wit:

* * * * *

"We, the jury in the above-entitled and numbered cause, find for the plaintiffs, Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen, and John Dalton, partners under the firm name and style of the Alaska United Mining Company, the claims in controversy.

"(Signed) J. MONTGOMERY DAVIS,
Foreman.

"Which said verdict was by the court received and ordered recorded, and the findings therein contained upon the issues in said cause were by the court approved and adopted.

"Now, therefore, upon consideration of the said bill, the answer thereto and the cross complaint of said defendants, the replication of plaintiffs, and the said proofs, and by reason of the verdict of the jury thereon, approved and adopted by the court, it is, upon consideration thereof, ordered, adjudged, and decreed as follows, to wit:

"That the said defendants, C. G. Lewis, Bert Woodin, Edwin Hackley, Alex. McConaghy, Carl A. West, W. S. Hawes, Charles P. Leitch, and C. P. Cahoon, a mining copartnership under the name and style of the McKinley Creek Mining Company, have not, nor have any of them, any right, estate, title, or interest whatever in or to those two certain mining claims, lands, and premises described in the said bill of complaint and in the said answer and cross complaint of defendant and hereinafter more particularly described; that the title of the plaintiff, The Alaska United Mining Company, a corporation composed of Peter Hall, William A. Chisholm, Dan. Sutherland, Jas. Hansen, and John Dalton, thereto, is good and valid, and that the said defendants and each of them be, and they and each of them are hereby, forever enjoined and restrained from asserting any claim whatsoever in or to said mining claims, lands, and premises adverse to said plaintiffs, and that the said plaintiffs be, and they are hereby, quieted in their possession, use, and enjoyment of the same."

A description of the claims followed.

Objection was made to the judgment, and the defendants claimed that the only judgment which could be entered was one "restraining the defendants from the acts complained of in the bill of complaint pending the trial of cause No. 967, *McKinley Creek M. Co. v. Alaska United M. Co.*, which is a suit in ejectment now pending in this court and at issue, the record and files of which are hereby referred to and made a part of this objection."

From the judgment entered the case is here on appeal.

S. M. STOCKSLAGER and GEORGE C. HEARD, for appellants.

L. T. MICHENER, W. W. DUDLEY, J. F. MALONEY, and J. H. COBB, for appellees.

Mr. Justice McKENNA, after stating the case, delivered the opinion of the court:

The assignments of error present for review the rulings of the court upon the admission of testimony, the correctness of the court's instructions to the jury, and the sufficiency of the evidence to justify the judgment.

We may dispose of the rulings on the admission of testimony summarily. They are not precisely indicated by counsel in their brief, and to review them with a detail of the evidence would unduly extend this opinion. It is enough to say that we have examined the evidence and considered the rulings, and do not discover any prejudicial error in the latter. Besides, it is questionable if such rulings are reviewable in an appellate court. *Wilson v. Riddle*, 123 U. S. 608, 31 L. Ed. 280, 8 Sup. Ct. 255; *Huse v. Washburn*, 59 Wis. 414, 18 N. W. 341; *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. 674.

For an understanding and consideration of the other contentions of appellants it is only necessary to indicate the propositions which the evidence of the parties tended to estab-

lish. On the part of the plaintiffs (appellees) the evidence tended to show that Dan. Sutherland, James Hanson, William Chisholm, and Jack Dalton, who compose the appellee company, and Peter Hall, and one Hawes, and C. P. Cahoon, were working at Pleasant camp in Alaska, for William Chisholm on and prior to October, 1898. Prospecting on the river Porcupine was resolved on to be done by Hanson, Sutherland, and Cahoon, and the following power of attorney was given to Cahoon:

Know all men by these presents that Peter Hall, William Chisholm, William S. Hawes, of Pleasant camp, British Columbia, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, C. P. Cahoon, of Pleasant camp, British Columbia, our true and lawful attorney, for us and in our names, place, and stead, to locate a mining claim in the territory of Alaska.

In testimony whereof we have hereunto set our hands and seal this 4th day of Oct., A. D. 1898.

PETER HALL.	[SEAL]
WM. A. CHISHOLM.	[SEAL]
WM. S. HAWES.	[SEAL]

Signed, sealed, and delivered
in the presence of—

DAN. SUTHERLAND.
J. HANSEN.

Provisions were furnished the party and they started out on the 4th of October, 1898, and met on the creek (subsequently given the name of McKinley) certain members of the appellant company. Gold was discovered, and Cahoon wrote notices of location for Chisholm and Hall upon a snag or stump in the creek, making their claims contiguous, and afterward reported that he had done so, saying that he had staked Chisholm first and Hall next. Chisholm and Hall went to the claims about the 20th of October, and cut trails to them, and did other work upon them; and at that time copied the notices of location and had them recorded. The notices, with their indorsements, were introduced in evidence.

The testimony was given by several witnesses and in great detail, and it was opposed at about all points by testimony of several witnesses, including Cahoon; and as to who first discovered gold there was a decided conflict whether Sutherland did, who is one of the appellee company, or whether Hackley did, under a location by whom the appellant company claims. Also a conflict as to whether Hackley protested when Cahoon wrote the notices of location for Chisholm and Hall, and whether Cahoon promised to take them down and authorized Hackley to do so, and, upon his declining, authorized Lewis, one of the appellant company, to take them down and relocate Chisholm and Hall further up the creek, and whether Lewis did so.

1. It will be observed that the main controversy of fact between the parties was as to who made the first discovery of gold,—Hackley or Sutherland. On this testimony appellants base three contentions, to which, they claim, the instructions asked by them at the trial court were addressed:

(1) That the discovery of mineral is a precedent condition to the making of a valid location, and that Hackley was the first to discover gold.

(2) That the locations relied on by appellees were invalid because they were not "distinctly marked on the ground, or otherwise designated as required by law."

(3) That the citizenship of Chisholm and Hall was put at issue by the pleadings, and no evidence was offered to establish it, but, on the contrary, the power of attorney under which Cahoon acted represents them to be citizens of British Columbia.

Without now questioning the soundness of either of these contentions, it is enough to say that the assignments of error based upon the refusal of instructions cannot be entertained. This is undoubtedly a suit in equity, and if it may be regarded as entertained under the general powers conferred by the act of May 17, 1884 (23 Stat. at L. 24, chap. 53), error

cannot be predicated upon the giving or the refusing of instructions. The verdict was but advisory to the court, to be adopted or disregarded at the court's discretion. This we regarded as indisputable, but in order that counsel might be heard upon the effect of the Oregon Code, if regarded as applicable to Alaska, we requested briefs of counsel "as to what errors, in respect of giving or refusing instructions or other rulings on trial by a jury in a cause of this character, are open for consideration on appeal from the district court of Alaska."

In response to that request, counsel for appellant urge that by § 7 of the act of May 17, 1884, *supra*, the final judgments of a district court of Alaska are reviewable by this court "as in other cases," and that the terms, "other cases," "necessarily refer to the procedure for review provided by §§ 691 and 692, Revised Statutes, governing district and circuit courts having like jurisdiction." But the procedure there prescribed is for the purpose of reviewing error, and error, as we have already said, cannot be based on instructions given or refused in an equity case. Nor is the rule different in the state of Oregon. *De Lashmutt v. Everson*, 7 Or. 212; *Swegle v. Wells*, 7 Or. 222.

2. There was no finding of facts by the court, and, assuming that we may look into the evidence, we find it conflicting as to who first discovered gold,—Hackley or Sutherland. The court below evidently determined that Sutherland did, and, having no test of the credibility of the witnesses, we cannot pronounce that determination unsound. Sutherland seems to have been acting with and co-operating with Cahoon. At any rate, Sutherland is not contesting the locations made by Cahoon for Chisholm and Hall, but, on the contrary, asserts their validity and claims title under them. The locations, therefore, are valid so far as they depend upon the discovery of gold.

The second contention is that they are invalid because they

were not "distinctly marked on the ground." The appellants base this contention on Cahoon's testimony. His testimony is that he wrote the notices of locations upon a stump or snag in the creek, and they were as follows: "I, the undersigned, claim 1,500 feet running down this creek and 300 feet on each side."

But the notices produced by other witnesses, and which were testified to be copies, as near as could be made out, of those on the stump, were respectively as follows:

Notice is hereby given that I, the undersigned, have, this 6th day of October, 1898, located a placer mining claim 1,500 feet running with the creek and 300 feet on each side from center of creek known as McKinley creek, in Porcupine mining district, running into Porcupine river. This claim is the east extension of W. A. Chisholm claim on about 1,800 feet from the first falls above the Porcupine river, in the district of Alaska.

PETER HALL, Locator.

Witnesses: J. HANSEN.
D. SUTHERLAND.

Notice is hereby given that I, the undersigned, have, this 6th day of Oct., 1898, located a placer mining claim 1,500 feet along creek bottom and 300 feet from center of creek each way on creek known as McKinley, in Porcupine mining district, described as follows: West extension of Peter Hall's claim and about 300 feet above first falls on said creek, in the district of Alaska.

WM. A. CHISHOLM, Locator.

Witnesses: D. SUTHERLAND.
JAMES HANSEN.

These notices constituted a sufficient location; the creek was identified, and between it and the stump there was a definite relation which, combined with the measurements, enabled the boundaries of the claim to be readily traced. *Haws v. Victoria M. Co.*, 160 U. S. 303.

3. Conceding, appellants say, a proper discovery and a proper description of the location, nevertheless, as the citizenship of the locators was put in issue, it was necessary to be

proved to justify a judgment for the appellees, because, under § 2319, Rev. Stat., the public lands of the United States are only open to exploration, occupation, and purchase by citizens of the United States and those who have declared their intention to become such.

In *Manuel v. Wulff*, 152 U. S. 505, this court sustained the validity of a conveyance of a mining location to an alien, reversing a decision of the supreme court of Montana to the contrary. The decision was based upon the difference between a title by purchase and title by descent, and the doctrine expressed that an alien can take title by purchase, and can only be divested of it by office found. The case of *Doe v. Robertson*, 11 Wheat. 332, was cited and approved, and the remarks of Mr. Justice Johnson in that case become apposite:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to a regard to the peace of society and a desire to protect the individual from arbitrary aggression. Hence it is usually said that it has regard to the solemnity of the livery of seisin, which ought not to be divested without some corresponding solemnity. But there is one reason assigned by a very judicious compiler, which from its good sense and applicability to the nature of our government makes it proper to introduce it here. I copy it from Bacon, not having had leisure to examine the authority which he cites for it: 'Every person,' says he, 'is supposed a natural-born subject that is resident in the Kingdom and that owes a local allegiance to the King, till the contrary be found by office.' This reason, it will be perceived, applies with double force to the resident who has acquired of the sovereign himself, whether by purchase or by favor, a grant of freehold."

That grantees of the public land take by purchase this court, in *Manuel v. Wulff*, left no doubt. It was said that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes v. Gracey*, 94 U. S. 762; *Belk v. Meagher*, 104 U. S. 279; *Guillim v. Donnellan*, 115 U. S. 45; *Noyes v. Mantle*, 127 U. S. 348.

The appellants, however, deny the application of *Manuel v. Wulff*, and contend that this suit having been brought under § 500 of the Oregon Code, in order to maintain the suit, the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that, while the validity of the location may not be disputed by appellants, that the right to the possession, which is but an incident of the location, may be. We do not concur in this view. The meaning of *Manuel v. Wulff* is that the location by an alien and all of the rights following from such location are voidable, not void, and are free from attack by anyone except the government.

It is not necessary to notice other points made by appellants; and, discovering no error in the record,

Judgment is affirmed.

ALEXANDER JOHNSTON V. ENOCH FILER ET AL.

(201 Pennsylvania 60; 50 Atl. 940. Supreme Court. January 6, 1902.)

Where the long ton of 2240 pounds is specified in the contract referring to one size of coal it will be assumed that the long ton was intended as to all the other sizes.

Minimum screen. Where a lessee is allowed free all coal which passes through a certain sized mesh he cannot be required to pay royalty on such coal although he puts it through a smaller mesh and markets it. It is not screened coal within the meaning of the clause calling for royalty on all coal screened.

Appeal from Court of Common Pleas, Mercer County.

Action by Alexander Johnston against Enoch Filer and others, miners and shippers of coal under the name of Westerman, Filer & Co. Judgment for defendants, and plaintiff appeals. Affirmed.

A lessee was to pay royalty on all the coal that would pass over a $\frac{5}{8}$ -inch mesh; the refuse, or culm, was to belong to lessor. *Held*, that this did not restrain the lessee from using a smaller mesh. *Lance v. Lehigh Co.* 163 Pa. 84; 29 Atl. 755.

Lessee not bound to pay for slack where his royalty is based on screened coal, but he cannot increase the customary size of the mesh. *Dunham v. Haggerty*, 110 Pa. 560; 1 Atl. 667.

Where the same royalty is paid on another class of coal the change of screens could make no difference. *Carr v. White Breast Co.* 88 Ia. 136; 55 N. W. 205.

Lessee has the right to change screens to meet the changing demands of the market. *Id.*

Where the royalty was fixed to be paid on all coal passing over a half inch mesh, the lessee was compelled to pay royalty on finer coal when he used a finer mesh. By divided court. *Genet v. Delaware Co.* 12 N. Y. S. 572.

Where a coal lease provided a royalty graded on size, and provided also for a minimum production without fixing how many tons of each size should be mined. *Held*, that it should be made up of the different sizes of coal in proportions as produced by ordinary careful coal mining. *Schooley v. Butler Mine*, 175 Pa. 261; 34 Atl. 639.

Case stated to determine the amount of royalties due. The material portions of the case stated were as follows:

1. The defendants mined and removed from the lands of plaintiff certain qualities of bituminous coal under and in pursuance of the following coal lease or contract:

"This agreement made this 14th day of October, A. D. 1880, by and between Alexander Johnston, of the county of Mercer and state of Pennsylvania of the first part and T. M. Watson of the second part; Witnesseth: That the said party of the first part for and in consideration of the covenants hereinafter to be performed by the party of the second part, do by these presents grant, bargain, sell and convey to the second party, all the coal, iron ore, limestone or other minerals in that certain tract of land, situate in the township of Pine, Mercer county, and State of Pennsylvania, bounded and described as follows to wit: Bounded on the north by lands of W. Aubeny, east by lands of J. D. McDowell and public road, south by lands of P. Shipler and Stewart, west by D. McKnight and A. McElheney, containing 72 acres more or less, together with all the rights and privileges upon said land incident, necessary and convenient for the mining, securing and removing the said minerals from said land and other lands, including the right of deposit thereon, waste and refuse material.

"In consideration whereof, the said party of the second part, for his heirs or assigns, hereby covenant and agree to pay to the said party of the first part, ten cents for each ton of 2,240 pounds of merchantable iron ore and ten cents for each ton of 2,240 pounds of merchantable screened black coal and ten cents for each ton of merchantable screened bituminous coal, the screen used not to exceed 1½ inches, and the screenings to belong to the party of the second part,

Construction of graded royalty on phosphate bed based on market price where after the delivery of the lease the mode of marketing changed. A full case on graded royalties. *Harlan v. Central Ph. Co.* (Tenn.) 62 S. W. 614.

Where a lease called for larger royalties on the larger sized coal, smaller royalties on the smaller sizes: *Held*, that the lessee must pay for the coal not as he mined it and was compelled to mine it by the market demand, but according to the proportion of sizes marketed at the date of the lease. *Mitchell J. dissenting. Wright v. Warrior Run Co.* 19 M. R. 102.

Where lessor accepts royalty on the screened ore and knows that the tailings are treated as waste he cannot thereafter recover royalty on the tailings. *Steer v. Dwyer*, 104 Mo. Ap. 523; 79 S. W. 738.

free of charge, and ten cents for each ton of 2,240 pounds of limestone, payments to be made semi-annually on the first days of January and July of each year."

2. That all of the coal mined by defendants from plaintiff's lands under said lease was screened, in the first instance, over a one and one-half inch screen, and that the amount passing over this screen was 41,121 gross tons of 2,240 pounds each; and that defendants paid to plaintiff in semi-annual payments while mining was going on ten cents per gross ton for all of said 41,121 gross tons of coal.

3. That 27,414 gross tons of coal passed through said one and one-half inch screen.

4. That of said 27,414 gross tons of coal so passing through said one and one-half inch screen, 10,143 gross tons were sold and shipped by defendants without any further division of the same; the manner of shipment being as follows: These 10,143 gross tons were reunited with the lump coal from which they had been separated by the said one and one-half inch screen, and together sold and shipped as run of mine.

5. That 17,271 gross tons of said coal passing through said one and one-half inch screen were further divided by defendants by means of a three-quarter inch screen, and by this means 5,613 gross tons of nut coal were obtained which were sold and shipped by defendant separately as nut coal.

6. If the said 10,143 gross tons which passed through said one and one-half inch screen had been screened again in the same manner as said 17,241 gross tons above mentioned, it would have produced 3,296 gross tons of nut coal.

7. That all of said various kinds of coal, including the slack, which passed through the small screen, was sold and shipped by defendants.

B. MAGOFFIN, for appellant.

Q. A. GORDON, for appellees.

MITCHELL, J. The contract contemplates the avoirdupois ton of 2,240 pounds. This is distinctly specified in regard to each separate subject for which royalty is to be paid, viz., iron ore, coal, and limestone. Two kinds of coal are provided for,—screened block and screened bituminous,—and no distinction is made between them as to royalty, or as to the size of the mesh in the screen. There is no ground to infer any

intended distinction as to the ton by which the royalty is to be measured. On the contrary, the kind of ton being specified at the first mention of coal, the presumption is that it was intended to apply to all kinds of coal that were mentioned.

On the other question the contract provides, "the screenings to belong to the party of the second part, free of charge," and stipulates for a maximum screen. Whatever passes through that belongs to the defendants, and whether they put it all in the culm pile, or rescreen it, and sell part as nut coal, is no concern of plaintiffs. Passing it a second time over a smaller mesh does not bring it under the description of "merchantable screened bituminous" coal, for which royalty is to be paid, for that was already settled by the provision for a screen not exceeding $1\frac{1}{2}$ inches. This feature distinguishes the case from *Mercer Mfg. Co. v. McKee's Adm'r*, 77 Pa. 170, and *Dunham v. Haggerty*, 110 Pa. 560, 1 Atl. 667.

Judgment affirmed.

SUSAN MATULYS V. PHILADELPHIA & READING COAL &
IRON CO.

(201 Pennsylvania 70; 50 Atl. 823. Supreme Court. January 6, 1902.)

The right to mine on ground described and granted without liability for surface support is no defense to an action for causing subsidence by destruction of the lateral supports by taking coal from adjoining land.

Absolute right of lateral support to soil only. The lateral support of the land, to which the owner thereof has an absolute right and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition and does not include support for the protection of buildings or improvements upon it.

Buildings protected against negligence only. Negligence or want of due care in withdrawing lateral support in excavating or mining adjoining land for which there is liability for injury to a neighbor's buildings means positive negligence, or manifest want of due care in the excavations or mining so far as they affect, or are likely to affect, adjoining improvements.

Appeal from Court of Common Pleas, Northumberland County.

Action by Susan Matulys against the Philadelphia & Reading Coal & Iron Company for depriving land of lateral support. Judgment for plaintiff, and defendant appeals. Modified.

The surface owner may recover against the mine which has withdrawn his support for injuries to house, springs and ground. *Gumbert v. Kilgore*, (Pa.) 6 Atl. 771.

Definition of "ordinary precautions" to prevent sinking of surface. The sinking of the land held conclusive presumption that ordinary precautions had not been taken. *Youghiogheny Co. v. Hopkins*, 21 M. R. 188.

Injunction denied to prohibit mining the coal and so endangering subsidence. Consideration of the relation of the parties and the remedy at law. *Lloyd v. Catlin C. Co.* 210 Ill. 460; 71 N. E. 335.

At the trial it appeared that the defendant on May 25, 1885, had conveyed to plaintiff certain lots in the borough of Mt. Carmel, reserving the mineral thereunder. The terms of this deed and other facts in the case are stated in the opinion of the supreme court.

The court charged in part as follows:

It is contended that the defendant is not liable because the mining and excavations causing the subsidence and squeeze was not upon or underneath the plaintiff's premises but some 100 feet to the south further up the vein or veins. It is contended that the defendant had a right to mine the coal upon its own land, owning both the surface and mineral, as it pleased, and no difference what the manner of mining whether all the coal was taken out or not, or whether the surface subsided or not, it is not liable to the plaintiff.

We think differently. Under the common-law rule the owner of the minerals is bound to so conduct his operations in the removal of them as not to disturb the adjacent surface and do injury to the owner thereof. That is the law in England followed in this country and held as late as *McGettigan v. Potts*, 149 Pa. 155. This case has been cited by the defendant as having bearing on another question, but it undoubtedly holds the law to be as I have stated, that an owner of adjoining property owes the duty of lateral support to his neighbor and may not so conduct his operations of quarrying or mining upon his own lands as to injure his neighbor's property. It is an absolute duty.

It is not a question of negligence whether he is using due care in his operations on his own property, but there is an absolute duty to support the surface of his neighbor's land which he at all times must observe.

Therefore we hold under that and other authorities that there was a duty upon this defendant to so mine its coal as not to disturb and injure the surface of the Matulys lots.

That in no event can it escape liability on account of the injury to the surface of said lots. That it is not a question of negligence.

The parties have agreed upon the amount of damages to be assessed: Two thousand dollars on account of the injury to the surface of the lots and five hundred dollars additional on account of injury to the buildings erected on the lots.

It is contended that the duty of lateral support, about which I have spoken to you, extends only to the surface in its natural condition, and that there can be no recovery on account of injury to a building upon the lot, by reason of the removal of the natural support, and that therefore all that can be recovered in this case would be the \$2,000 for the injury to the surface of the lots in question. Under the authority of *Gumbert and Huey v. Kilgore*, in 6 Central Reporter, 406, I rule this question against the defendant for the present and instruct you that the plaintiff is entitled to recover not only for the injury to the soil, or the lots, in their natural conditions expressed in legal phrase, but also for the injury to the buildings, and therefore your verdict should be for \$2,500. I can consider this question, as well as other questions in this case, on a motion for a new trial and if I come to the conclusion that they are not entitled to be compensated on account of injury to the buildings, I can reduce the verdict, or if I should continue to be of the same opinion, I can let it stand under the agreement of the parties, fixing the exact amount of the damages on account of each item of injury, and the supreme court can reduce the judgment.

S. P. WOLVERTON, JOHN F. WHALEN and GEORGE F. BAER, for appellant.

W. H. M. ORAM, L. S. WALTER and P. A. VOUGHT, for appellee.

BROWN, J. In the two deeds from the appellant to the appellee, for the lots to which the alleged injury has been done, the following reservations and conditions occur: "Excepting and reserving to the said party of the first part, their lessees, tenants, or their successors and assigns, all the fossil or mineral coal, iron, and other ores that may be found under

the surface of the earth within the boundaries of the above mentioned and described lot or piece of ground, with the entire right to mine, dig, and carry away the same, and to pass into and through said land in all directions, and to excavate and use the same below the surface for all purposes necessary or convenient in mining coal, ores, or minerals from said land, and from any other land, as fully and freely as if this grant had not been made, without making any compensation therefor to the said party of the second part, her heirs and assigns; provided, always, that neither the said party of the first part, or their successors or assigns, nor any other parties interested in the legal or equitable titles to the premises, shall be in any way responsible for the acts or doings of their lessees, or any of them, in working, mining, or digging the said coal, iron, or other minerals, nor for any loss or damage which such acts or doings may occasion to the said party of the second part, or any other person or persons, owners or occupiers of the premises; excepting and reserving, also, all running springs and streams of water on the surface of the ground which may at any time hereafter be diverted by the said party of the first part, their successors or assigns, if it should be deemed expedient for their use, or for the purpose of laying out and making any streets or alleys; and also the rights of laying water and gas pipes through or under the surface of the said streets or alleys, doing as little injury as possible; and also the right of making and using drifts and tunnels through and under the said lot or piece of ground in all directions, for mining purposes, on the same or other land."

The injuries of which the appellee complains have not resulted from the mining of coal under the lots conveyed by these deeds, but from mining operations at least 100 feet distant, beneath surface owned by the appellant. The subsidence of that surface caused the surface of appellee's lots to crack or open; and, however earnestly learned counsel for

the appellant may ask us to consider the foregoing reservations in determining whether there is any liability to the appellee, it is manifest that the questions raised on this appeal must be considered and disposed of without regard to them. Nothing that was done beneath the lots conveyed, to which alone the exceptions and reservations in plainest words apply, injured appellee's property. No use by the appellant of the land beneath appellee's surface, in mining coal there, or in mining it "from any other land," is complained of. It was the subsidence of the surface of the adjoining property, owned by the appellant, that caused the injury for which compensation is sought, and it is clear, without further comment, that any liability of the defendant is that of an adjoining owner failing in the discharge of an absolute duty not to interfere with the lateral support of the land of appellee, and causing injury to the buildings of the latter by carelessness and negligence in mining operations on its own land. The question involved is not whether there is any liability by the appellant to the appellee, in view of the reservations in the deeds of the former to the latter, but is simply whether the Philadelphia & Reading Coal & Iron Company, in operating its own mines, is liable to an adjoining surface owner for injuries resulting from its withdrawal of lateral support, and must be determined as if the reservations had not been incorporated in the deeds.

From the testimony submitted by the plaintiff, it appears that certain supports of the surface of the land that was being mined by the defendant more than 100 feet south of plaintiff's land gave way, and a subsidence of defendant's surface followed. The surface was of rock, of some length, and, in settling, worked like a lever, the one end, or power, being on the land of defendant, and the other, or weight, on that of plaintiff. As the end on the south subsided, the other end on the north, on plaintiff's land, cracked or broke, leaving a crevice, and causing injury to the lots and buildings on

them. No testimony was offered by the defendant, and, in its history of the case, it frankly admits: "The injury was not caused by mining under the lots conveyed, but by mining operations several hundred feet distant, and the subsidence of the surface at that point, causing the surface of the lots to open at different points, which the plaintiff claims injured her buildings." The case is, therefore, one of injury resulting to a landowner from the withdrawal of lateral support by an adjoining owner in its mining operations on its own land. The plaintiff was entitled to the natural lateral support of her ground, and, if the same was withdrawn by her neighbors in mining operations on its own land, for any injury to her lots resulting from the withdrawal of such support compensation must be made. The right to such lateral support is an absolute one, and the adjoining owner who withdraws it, whether negligent or not, in excavating or mining his land, is liable for injuries resulting to his neighbor's ground. *McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198; *McGuire v. Grant*, 25 N. J. Law, 365, 67 Am. Dec. 49. "But in the case of land which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor, and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain action against him, without proof of negligence." *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312.

Under plaintiff's proof—so clear that the defendant does not attempt to controvert it—that the injury to her lots resulted from defendant's withdrawal of their lateral support in its mining operations on its own property, the learned trial judge correctly directed the jury to return a finding in her favor for the amount of damage done to the lots. By agreement of parties, this damage was fixed at \$2,000, and for that sum plaintiff is entitled to judgment on the verdict. We cannot, however, approve the court's direction that a finding

should be returned for \$500 in favor of the plaintiff, the sum agreed upon as the amount of damage done to her buildings. The lateral support of land, to which the owner thereof has an absolute right, and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition, and does not include support for the protection of buildings or improvements upon it. This is well settled in England and with us. *McGettigan v. Potts*, *McGuire v. Grant*, and *Gilmore v. Driscoll*, *supra*. Attention can properly be called to the numerous authorities cited in the last case.

As this absolute right to lateral support is limited to the land itself in its natural condition, there can be no recovery for injuries to buildings or improvements resulting from the withdrawal of such support, in the absence of proof of negligence or carelessness in excavating or mining on the adjoining land. This is equally well settled, and the rule is nowhere more distinctly announced than in *Foley v. Wyeth*, 2 Allen, 131, 79 Am. Dec. 771, where the court after referring to the absolute right of an adjoining owner of land to lateral support for it in its natural condition, said: "It is a necessary consequence from this principle that, for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care

or skill, or positive negligence, has contributed to produce it."

Is there proof of any negligence or want of care on the part of appellant which resulted in the injuries to appellee's buildings? Nothing, as we have already seen, was done beneath plaintiff's surface that caused any of the injuries complained of. No support by those mining beneath it was withheld from the upper owner, entitled to it, resulting in injuries for which there would be an unquestioned liability, and *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385, upon which appellee seems to rely, is not at all in point. If the appellant was negligent or careless, it was so only as to its own surface beneath which it was mining; but it was responsible to no one for its negligence or want of care there, unless likely to result in injury to another or his property, to whom or to which the duty of care was owed. So far as the buildings of the appellee are concerned—and, for that matter, her land itself—nothing can be found in the testimony showing negligence or carelessness by the appellant. Nothing that it did on its own land in its mining operations indicates any negligence or want of care towards its neighbor, and it could not reasonably have anticipated that, even if it failed to properly support its own surface, the peculiar injury complained of would result. Negligence or want of due care in withdrawing lateral support in excavating or mining on adjoining land, for which there is liability for injury to a neighbor's buildings, means positive negligence or manifest want of due care in the excavations or mining so far as they affect, or are likely to affect, adjoining improvements. There was not only no proof of such negligence here, but the appellant can fairly say that, even if he did not properly support its own surface, it ought not to be charged against it that it should reasonably have anticipated what happened to appellee's surface, and the improvements on the same, by reason of its failure to support its own surface.

The judgment that the appellant pay \$500 for injuries to appellee's buildings is reversed, and is now for \$2,000, for the injury to the surface of the lots, with interest from April 17, 1900, the date of the verdict.

S. E. CALHOON ET AL. V. FRANK W. NEELY ET AL.

(201 Pennsylvania 97; 50 Atl. 967. Supreme Court. Jan. 6, 1902.)

¹Title under an oil and gas lease is inchoate and for purposes of exploration only until oil or gas is found. If it is not found no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.

On facts undisputed, abandonment is a question of law. Where a lessee for oil and gas for a term of fifteen years sinks a dry well and then removes his machinery and quits the premises for nine years, it is a total abandonment which justifies its determination as such by the court without leaving it to the jury.

Appeal from Court of Common Pleas, Beaver County.

Ejectment by S. E. Calhoon and others against Frank W. Neely & Co. and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

At the trial it appeared that plaintiffs claimed title under an oil and gas lease to the Pleasant Valley Oil & Gas Company, which was as follows:

"This agreement, made and entered into this 28th day of July, 1890, by and between Frederick Mohr, of the county of Beaver and State of Pennsylvania, of the first part, and The Pleasant Valley Oil and Gas Company, of the second part,

"Witnesseth: That the said party of the first part, for the consideration of the covenants and agreements hereinafter mentioned, has granted, demised and let unto the party of the second part, their heirs and assigns, for the purpose and with the exclusive right of drilling and operating for petroleum and gas.

"All of that certain tract of land situate in Economy township, Beaver county, and State of Pennsylvania, bounded and described as follows, to-wit: On the north by William Brown heirs; on the

¹*McNish v. Stone*, 17 M. R. 22. *Steelsmith v. Gartlan*, 19 M.-R. 315.

east by Shelb and McAllys heirs; on the south by Mr. William Miller or Bock heirs; on the west by lands of Andrew Moore; containing eighty-six acres, be the same more or less.

"The party of the second part, his heirs or assigns, to have and hold the above described premises during the term of fifteen years from the date hereof, and as much longer as oil and gas is found in paying quantities thereon.

"The said party of the second part, in consideration of the said grant and demise, agree to give the party of the first part the full equal one-eighth part of all the petroleum obtained or produced on the premises herein leased, and to deliver the same in tank or pipe line to the credit of the party of the first part.

"It is further agreed that if gas is found in paying quantities the consideration, in full, to the party of the first part, instead of the one-eighth royalty, shall be five hundred dollars per annum, for the gas from each well, when marketed; and gas free of cost for household use on the premises.

"The party of the first part grant the further privilege to the party of the second part of using sufficient water from the premises herein leased necessary to the operation thereon; the right of way over said premises, together with the right to lay pipe to convey oil or gas from this or other property of the party of the second part; the right to remove all machinery or fixtures placed on said premises by the party of the second part.

"The test well shall be located in the hollows, or at such places as do no unnecessary damages; and any damage done to growing crops by the operation of the second party shall be paid for by the holders of this lease. Operations to be commenced on said above described premises thirty days from the date hereof, and prosecuted with due diligence to completion; and no right of action shall after such failure accrue to either party on account of the breach of any covenant herein contained.

"It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors and assigns."

The evidence of abandonment is set forth in the opinion of the supreme court.

The court gave binding instructions for defendant.

WALTER G. CRAWFORD, JAMES H. CUNNINGHAM, and
FRANK H. LAIRD, for appellants.

A. P. MARSHALL, for appellees.

BROWN, J. Plaintiffs and defendants both claim title to the premises in controversy as the lessees of Frederick Mohr. The undisputed facts in the case are that the lease under which plaintiffs claim was made on July 28, 1890, to the Pleasant Valley Oil & Gas Company, for oil and gas purposes, and embraced 86 acres of land in Economy township, Beaver county; that it was for a term of 15 years, and as much longer as the oil and gas might be found in paying quantities; that the appellants became the assignees of the lease, and within 60 days from its execution they erected a rig and drilled a test well upon the premises, but obtained no oil; that, as soon as the well was completed and found to be dry, they removed from the premises all the machinery used in drilling the well, leaving nothing except an oil tank, which was allowed to rot on the ground; that from the time they so left the premises they did nothing and asserted no title until Mohr, on June 5, 1899, nearly 9 years after the date of the lease under which they claim, leased 36 acres of the same land to Neely for oil and gas purposes, and he, with the other appellees, as assignees of interests in this second lease, went into possession of the premises, commenced operations upon the land, and succeeded in drilling paying wells. Under this state of facts, the jury were instructed to find for the defendants.

On the part of the appellants it is urged that Mohr made the second lease because he thought the first one was but for five years, and that, as it was really for 15 years, the title of the first lessees is good for that period. It is immaterial, however, for what term the lease was made, and it must be regarded as written for "the term of fifteen years from the date hereof, and as much longer as oil and gas is found in paying quantities;" for the right of the lessees was to explore for oil and gas, and ascertain whether both or either were on the leased land. "The right of the lessee or grantee under its provisions was to explore for, and determine the existence

of, oil or gas under the farm. If none was found, the rights of the grantee ceased when the explorations were finished. If oil or gas was found in paying quantity, then the contract took effect as an oil lease, and the lessee had a right and was under a contract obligation to operate the land for the production of oil during the time and upon the terms fixed in the lease. * * * A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate, and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract." *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732. The evidence of appellants' abandonment of the premises is clear. It is unequivocally testified to by one of the plaintiffs and Mohr, the lessor. The former testified as follows: "Q. You may state generally, Mr. Mahoney, what you did in pursuance of the lease, on the premises? A. Went right in and took possession. We put in a rig and drilled the well, but we didn't get any oil. Then I moved my property off. Q. Had you some part of the property? A. I owned everything except the tank. The tank was the property of the company. * * * Q. That was left there? A. Yes, sir." Mohr says: "Q. How long after they got the lease was it before they put the well down? A. It wasn't very long. As quick as they could get it. I suppose a couple of months. Soon afterwards, at least. Q. After they completed that well on your place, what did they do? A. Took their fixtures all away, and everything that belonged to them, excepting an old tank that they left to rot on the ground. Took everything else away, and never done nothing more. Q.

Did you ever have any conversation with any of them after that? A. Never a word; never." The suspension of operations, abandonment of the search for oil and gas, and relinquishment of the premises for nine years, were an unqualified surrender by the appellants of whatever rights they had to perfect their inchoate title. It was their announcement to the lessor that they were done, and that he could give exploring privileges to others. This he did, with satisfactory results, and but for them these appellants would probably not have been heard from.

Whether there was an abandonment here, as in all similar cases, was a question of intention, to be determined in the light of the conduct of the lessees. Turning to the testimony of one of them, already referred to, no other construction can be put upon their conduct than that they had abandoned the premises as a fruitless field, and intended to do so. No explanation is even attempted of their cessation of operations for nine years, until at last they were willing to become active at the sight of oil flowing from wells drilled by others. The learned trial judge could have given no other instructions to the jury than that their finding must be for the defendants. In doing so, he followed what we said in *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696: "Abandonment is a question of fact, to be determined by the acts and intentions of the parties. An unexplained cessation of operations for the period involved in this case gives rise to a fair presumption of abandonment, and, standing alone and admitted, would justify the court in declaring an abandonment as a matter of law."

The following clause in appellants' lease has been called to our attention as sustaining their right to recover: "Operation to be commenced on said above-described premises thirty days from the date hereof, and prosecuted with due diligence to completion; and no right of action shall, after such failure, accrue to either party on account of the breach of any cove-

nant herein contained." But this has no application to the single question before us, which is not one involving any right of action which Mohr or his later lessees claim to have against the lessees in the lease of July 28, 1890. It is not a question of forfeiture by the appellants. It is one of simple abandonment by them of the premises leased to them, and of all their rights under the lease, and for which abandonment, under the clause referred to, Mohr has no right of action against them. He did, however, have a right to lease his abandoned land to others; and the judgment in this case, that those to whom he did lease cannot be ousted by these appellants, is affirmed.

J. F. McCLOY v. THE WESTERN PENNSYLVANIA GAS CO.

(201 Pennsylvania 197; 50 Atl. 978. Supreme Court. Jan. 6. 1902.)

¹**Measure of damages for failure to test for oil.** Where a lessee covenants to test a well for oil and he fails so to do, and allows the lessor no opportunity to test for himself, the measure of damages on proof that oil would have been found is the full value of the royalty which such well should have produced to the lessor during the entire term.

Where unavoidable accident is a defense to a breach of contract the plaintiff is still entitled to return of the actual consideration which he has outlayed.

Fugitive nature of oil. On breach of a contract to take out mineral, the fact that the mineral remains in the ground goes to reduce the damages, but this rule cannot apply if the mineral be oil and there are other wells which are draining it off.

²**Opportunity to lessor to test.** Where a party fails to keep a covenant to test a well but he turns it over to the lessor under circumstances which would allow the lessor to make the test, the measure of damages is the sum it would have cost the lessor to make the test.

¹Where an oil well is practically completed and turned over, no mere imperfection not wilful will prevent recovery for the price of sinking, but damages for shortcomings may be deducted from the contract price. *Holmes v. Chartiers Oil Co.* 138 Pa. 546; 21 Atl. 231.

Construction of whether a 12-inch oil well means a bore of 12 inches or a flow of 12 inches is for the jury. Such well constructed under owner's supervision binds him to the size of the well as sunk. Change of size while sinking—measure of damages. *Charleston Co. v. Joyce*, 63 Fed. 916.

A contract to supply natural gas, unless unable by "due energy and diligence" in maintaining existing wells and sinking new ones to obtain a sufficient supply from present or future acquired territory, requires reasonable effort and expenditure to connect newly acquired territory in a contiguous county with the old pipe line. *Bridgewater Gas Co. v. Home Co.* 59 Fed. 41.

Action for damages for destroying well by exploding torpedo at the wrong distance down. *East End Oil Co. v. Pa. Torpedo Co.* 190 Pa. 350; 42 Atl. 707.

Action for damages allowed for failure to keep his covenants to sink wells but not forfeiture. *Ammons v. S. Penn Co.* 47 W. Va. 610; 35 S. E. 1004.

²*Young v. Forest Oil Co.* 20 M. R. 345.

Appeal from Court of Common Pleas, Washington County.

Assumpsit by J. F. McClay against the Western Pennsylvania Gas Company. Judgment for plaintiff. Defendant appeals. Affirmed.

At the trial it appeared that in 1885 David McClay leased the oil and gas under 400 acres of land to Frank Howard and H. W. Williams. These lessees subsequently assigned the lease to the Forest Oil Company and certain other persons. On June 15, 1891, the owners of the lease sublet the gas to the Western Pennsylvania Gas Company, but provided in the sublease that in case oil should be found the gas company should forthwith give notice to the lessees who should then have the right to test the well, and accept or refuse it as an oil well. David McClay subsequently died, and the land was divided into four portions, one of which became the property of J. F. McClay, the plaintiff.

In January, 1892, the gas company struck oil. It notified the Forest Oil Company and other lessees, and the latter after making a test declined to take the well. The rental provided in the original lease to be paid for gas wells was \$250 per annum. On January 28, 1895, an agreement was entered into between J. F. McClay and the Western Pennsylvania Gas Company by which the rental was reduced to \$175 per annum. In consideration of this reduction the gas company covenanted as follows:

"3. Before finally abandoning said well, said second party hereby agrees to fit up the same with pumping apparatus and test the capacity of it as an oil well. It is, however, distinctly understood that said test shall not in any way bind said company to continue the operations at said well, but it shall have the option to either operate it for oil or entirely abandon it."

In 1899, the gas company abandoned the well without complying with the covenant. Under objection and exception

the court admitted evidence tending to show the amount of oil production in 1892, and that the said production would have been about the same in 1899.

The court admitted under objection and exception evidence as to the cost of drilling an oil well in 1899.

The court charged in part as follows:

Then a fourth condition, as it might turn out to be in this case, and a fourth measure of damages, would be this: If the jury find that the defendant company left the well in a condition that it could not be tested, and that the failure was not unavoidable, or if the company left the well when it could have been tested and did not do it, and the plaintiff had no knowledge of that, and the jury find that the well, if it had been tested, would have produced oil in quantities that would have paid the lessee, that is, the Forest Oil Company, to operate it, as well as paid the plaintiff, then the measure of damages would be the value of the well, as you may find it to be, for the time that the lease was to run, and that from some time in September, 1900, until September 5, 1905.

Now, if you adopt this measure of damage you will have to apply your best judgment to the facts as developed here, in ascertaining what the value of that well could be. Of course one of the first things you would have to determine would be what would be its probable production. Of course you cannot fix that to the barrel, and the plaintiff is not bound to show you, to the barrel what it would have produced, but he is bound to produce evidence to show you that it would have produced at least the amount that you may fix upon. Then after you have got the amount, if there is any evidence here in regard to the price of oil, you can take that into consideration, with the time he would get the royalty under the lease, up until 1905; or if there is any testimony here, gentlemen, as to what a royalty such as would have developed there in 1900, at the time of the breach, would have sold for, running for five years, that testimony can be taken into consideration.

Defendant's points and answers were as follows:

5. The plaintiff in this case is entitled to recover only nominal damages and this only in the event of showing that any damages have been sustained by reason of the failure of the defendant to test said well. *Answer:* Refused. Whether the damage that the plaintiff is entitled to recover is only nominal depends upon the facts of the case as you may find them, as we have explained in our general charge.

6. That the plaintiff in this action can in no event recover damages to a greater extent than the amount of the difference between the rental upon this well, which had been paid to him immediately prior to the execution of the agreement of January 28, 1895, to wit: \$200, and what he was to receive under said agreement, to wit: \$175, from the date of said agreement down to the date at which said well was abandoned. *Answer:* Refused. It is a question for the jury, under the instruction given in the general charge, whether the plaintiff's damage shall be limited to \$125, the amount he reduced his rental in the five years or not.

Verdict and judgment for plaintiff for \$2,000.

A. M. TODD and J. A. WILEY, for appellant.

T. F. BIRCH, for appellee.

PER CURIAM. We have carefully read and considered the charge of the court, the 18 assignments of error relating to the admission of testimony on the part of the plaintiff's witnesses, the alleged error in the charge referring to the excerpt in the nineteenth assignment, and the refusal of the court to affirm the defendant's fifth and sixth points. We have not discovered in either of the eighteen assignments any cause for a reversal of the judgment, any error in the excerpt from the charge, or in the refusal to affirm the defendant's fifth and sixth points. The charge of the court was carefully presented and considered at every point, and the defendant has no cause to complain of the verdict or judgment.

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5. *A district rule fixing so many feet of sinking as full assessment work is not binding to allow of less expenditure than the Act of Congress requires, but is evidence tending to show what the miners considered to be the value of labor in that locality.* *Id.*

6. *Mining rights forfeited by failure to perform assessment work are revived by doing the required amount of work in any year, if it is done before a relocation.* *Crown Point M. Co. v. Crismon*, 406

7. *Review of testimony as to annual labor alleged to have been done in tunnel with the holding that it was sufficiently proved under the rule requiring clear case to enforce a forfeiture.* *Id.*

8. *Whether unwatering a shaft counts for annual labor suggested but not considered.* *Emerson v. McWhirter*, 470

9. *Facts amounting to resumption.*—The owner of the original location came to the ground December 30th; worked on the claim December 31st. January 1st was Sunday, but on the second he worked and so continuously until \$100 worth of labor had been

ANNUAL LABOR. *Continued.*

performed. The relocation was initiated Sunday morning (after midnight of the 31st). *Held* a valid resumption of labor and that the relocation was void. *Id.*

10. *Sunday*.—The fact that the first day of January fell on a Sunday considered with the holding that the resumer is not bound to work on Sunday. *Id.*

11. *Work on group*.—Where plaintiff, owning three contiguous mining claims, did no work on one claim, but did sufficient on the other two to have protected all, the question whether the work so done was for the benefit of the group of claims and tended to develop the one not worked on was for the jury. *Yreka M. Co. v. Knight*, 478

12. *Annual labor* is not required after entry. *Neilson v. Campagne Co.*, 664

13. *Failure to file affidavit of annual labor* does not make the claim open to location if the work was in fact performed. *Murray Hill Co. v. Havenor*, 668

See FORFEITURE, 7-9.

APEX.

1. *Wide apex covered longitudinally by two patents*.—When a secondary or accidental vein crosses a common side line between two mining claims at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, inasmuch as neither statute nor authority permits a division of the crossing part of the vein the rights of the parties will be determined by the priority of location, and the entire vein considered as apexing upon the senior location until it has wholly passed beyond its side line, without regard to the direction in which the vein dips. *St. Louis Co. v. Montana Co.*, 57

2. *Parallelism of end lines* was not required under the Act of 1866, but the terms of the Act of 1872 cannot be construed to allow to an 1866 location the right to follow on the dip to the full extent of diverging end lines. *Argonaut Co. v. Kennedy Co.*, 163

3. *May follow the dip at right angle to the strike*.—Under such a patent with diverging end lines the claimant neither loses all extralateral rights for that reason nor can he be allowed to follow his diverging end lines, but will be allowed the vein for the number of feet he owns on the strike and to follow down on the vein at right angles to the course of the vein on the strike. *Id.*

4. *Where the vein crosses both side lines* the side lines become

APEX. *Continued.*

end lines and the vein has no extralateral rights. *Parrott S. & C. Co. v. Heinze*, 232

5. *Where the vein crosses one side line* and departs at one end line the extralateral rights are bounded by the vertical plane of such end line and a parallel plane extended downward at the point where the apex leaves the side line. *Id.*

6. *The grant of a lode patent* differs from a common law grant in only two respects, to-wit.: It is enlarged by the addition of certain extralateral rights and is subject to the exercise of the extralateral rights of adjacent grants of the like character. *Id.*

7. *The common law right.*—Where a vein is found within the vertical planes of a patent and its apex is not found within the lines of some other patent or location having such lines relative to the apex as to give it the right to follow on the dip to reach the vein within the lines of the patent enclosing a part of the vein on its dip, such patent holds the part of the vein so enclosed under parcel of its content as a common law grant. *Id.*

8. *Burden of proof in apex case.*—Where defendants are working within their vertical lines the burden of proof is on the party alleging that he has an apex entitling him to follow the vein into defendant's ground. *Prima facie* such party is a trespasser. *Maloney v. King*, 278

9. *Although the evidence in favor of the apex* might not be considered sufficient upon final hearing it may be sufficient to sustain a temporary injunction. *Id.*

10. *Overlapping survey* may hold the extralateral rights which its lines call for. The locator of a lode mining claim has the right to lay any of his lines within or across the surface of a valid prior location, in the absence of objection by its owner, for the purpose of securing to himself underground or extralateral rights not in conflict with any rights of the senior location; and where a junior claim overlaps, having one of its parallel end lines laid within or across a senior location, its owner acquires all the rights, both surface and extralateral, as against the government and subsequent locators, that he could have if the prior location had not been made; and he may follow the vein in its downward course between the planes of his own end lines in all respects as though there were no prior location, except where it would conflict with the rights of the owner of such senior claim. *Bunker Hill Co. v. Empire State Co.*, 317

See ADVERSE CLAIM, 4.

APPURTENANCES.

1. *Conveyance of mill site carries water right.*—A deed of a

APPURTENANCES. *Continued.*

mill site, without specific mention of a right to divert water from a stream and to use it to operate a mill which has been used thereon, conveys the water right as an appurtenance to the mill site, in the absence of any reservation of it, of any conveyance of it to another, or any other evidence that the grantor did not intend to part with it. *N. A. Exploration Co. v. Adams*, 65

2. *A water right used upon a mill site to treat ore extracted from a mining claim, and brought to the mill site for treatment, is not appurtenant to the mining claim, but to the mill site. Id.*

BROKER—See CUSTOM.

CLAY—See MINERALS, 1, 2.

CONTRACT—See WORKINGS, 1, 2.

CONVEYANCE.

1. *A quit-claim deed implies a doubtful title in the grantor. Butte Hardware Co. v. Frank*, 368
See APPURTENANCES.

CORPORATIONS.

1. *Holds title as trustee.*—The title to property belonging to a corporation is vested in it for the use and benefit of its stockholders and it holds the property as a trustee. *Glengary Cons. M. Co. v. Boehmer*, 74

2. *Combination attempting control.*—Ordinarily the majority of the stockholders of a corporation have the right to control its affairs, but this must be done through its proper representatives in the interest of all the stockholders. No combination of stockholders less than the whole will be permitted to control the affairs of the corporation in their interest alone to the injury of the minority. *Id.*

3. *Where one mining corporation gets control of the majority of the stock of another and thereby is enabled and does select a directory under its control through which directory it secures a bond and lease on the property of the second company, such contract is void and will be set aside at the suit of the minority stockholders of the second company without regard to whether or not the controlling company was guilty of any actual fraud in securing the contract. Id.*

See FRAUD, 1, 2, 6; ESTOPPEL, 4; STOCK.

CROSS LODE.

1. *The servitude imposed upon the senior location of a mining claim by U. S. Rev. Stat. § 2336, by giving a right of way to the junior location, whether that extends only through the space of the intersection of the veins or through the space of intersection of the claims, does not otherwise affect the exclusive rights given the senior location, or except therefrom the cross veins apexing therein.* *Calhoun M. Co. v. Ajax M. Co.*, 381

CUSTOM.

1. *Local custom violative of law inoperative.*—A local custom of dealers in a place where a sale is made, which violates a well-established principle of law, and changes the nature and obligations of the relation of two parties to each other, is inoperative unless known and assented to by both. *Geyser-Marion Co. v. Stark*, 220

DIP—See DISCOVERY SHAFT, 4.

DISCOVERY.

1. *Indirect proof of discovery.*—Proof that a shaft had been sunk 25 or 30 feet deep and the witnesses speaking generally of the vein being there and of "rich rock" and "gold bearing rock" being found within the lines, though indirect, amounts to sufficient proof of a discovery within the claim. *Conway v. Hart*, 20
2. *Discovery on boundary line.*—A discovery shaft is not invalidated from the fact that it is partly on hostile ground, if it shows mineral within the boundaries of its own claim. *Healey v. Rupp*, 117
3. *Visit of strangers to shaft.*—Where it was contended that a shaft had been "salted" the visits and suspicious actions of designated parties seen at the shaft at night is admissible although there was no evidence that such persons were connected with defendants or interested in the controversy. *Id.*
4. *Rejection of proof of an assay taken from the dump of a discovery shaft, the existence of a vein in which shaft was a material issue, is reversible error.* *Id.*
5. *Discovery and notice essential.*—Under § 1496, Rev. St. 1898, to make a valid location of a mining claim the locator must first discover a lode or deposit of mineral in place, and then erect thereon, or in such close proximity thereto as to indicate the point selected as the place of discovery, a monument, and post thereon a notice of location, which must substantially comply with the requirements of § 1496. *Copper Globe Co. v. Allman*, 296

DISCOVERY. *Continued.*

6. *Actual discovery.*—There must be something beyond a mere guess on the part of the miner, to authorize him to make a location which will exclude others from the ground,—such as the discovery of the presence of the precious metals at the place where the notice of location is posted, or in such proximity to it as to justify a reasonable belief in the existence of a lode there. *Id.*

7. *An employe ascertaining that his employer has mined beyond his lines* into vacant ground is not precluded by the way he got his knowledge from locating a claim which will cover such workings. *Thallman v. Thomas*, 573

8. *Location without discovery.*—There can be no valid location of a mining claim without an actual mineral discovery thereon. *Tuolumne Co. v. Maier*, 678

9. *Discovery does not relate back.*—Conceding that a subsequent discovery may validate the claim, the land remains government land up to the time of such discovery. *Id.*

10. *Discovery on appropriated ground.*—A location of a mining claim based on a discovery of mineral within the limits of another existing and valid location is void. *Id.*

See DISCOVERY SHAFT; DITCH, 1; MINERALS, 3; PATENT, 3.

DISCOVERY SHAFT.

1. *New discovery shaft.*—When a discovery shaft is covered by a patent on an overlapping claim but the owners sink a new discovery shaft disclosing the vein their title is not invalidated. Such case distinguished from *Gwillim v. Donnellan*, 15 M. R. 482. *Lowry v. Silver City Co.*, 113

2. *Discovery after location complete.*—Where the location of a mining claim is void because no valid discovery of mineral has been made, a subsequent valid discovery within the boundaries of the claim made after the filing of the location certificate and all acts of location have been performed but before the rights of third parties have attached will make the location good. *Brewster v. Shoemaker*, 155

3. *Location of tunnel discovery.*—A valid location of a mining claim may be based upon an underground discovery on the dip of a vein at a distance below the surface, and without any surface opening upon the vein and without being shown by actual working to have its apex within the limits of the claim as staked. *Id.*

4. *Presumption of uniform dip.*—Where a discovery of mineral is made at a distance underground on the dip of the vein it will be presumed, in the absence of a showing to the contrary, that the vein extends upward at the same angle, and a valid loca-

DISCOVERY SHAFT. *Continued.*

tion may be made by making the point where the vein, if continued to the surface, would be disclosed, the initial point and by marking and describing the boundaries therefrom. *Id.*

See ESTOPPEL, 2.

DISTRICT RULES.

1. *Where district records are produced by the proper custodian and both parties tendered location notices filed with the same district recorder, there is sufficient proof of the existence of the district and of its rule requiring a record. McCann v. McMillan,* 6

2. *A district rule, although adopted prior to the Mining Acts, must yield to the latter and cannot allow of the location of a mill site upon mineral land. Cleary v. Skiffich,* 284

3. *Proof of.*—In an adverse suit against a placer location if plaintiff wishes to attack the validity of defendant's location on the ground that the local rules and regulations of the district have not been complied with, it is necessary for plaintiff to show what such rules and regulations are. *Kirk v. Meldrum,* 393

4. *There is no forfeiture for non-compliance with a district rule where the rule itself does not impose forfeiture as a penalty. Emerson v. McWhirter,* 470

See ANNUAL LABOR, 5.

DITCH.

1. *Where a ditch is located across a claim which has at the time no valid discovery such ditch remains a valid easement and is not divested by any later discovery of mineral upon the claim. Tuolumne M. Co. v. Maier,* 678

See WATER, 3.

DOWER.

1. *A widow whose dower has not been admeasured has no interest in the lands of her husband, so as to make a mining lease thereof. Hook v. Garfield Co.,* 81

DRAINAGE—See WATER, 2.

EASEMENT—See WATER, 1.

EJECTMENT.

1. *Plaintiffs allowed to recover after contract of sale.*—Where

EJECTMENT. *Continued.*

plaintiffs had made a deed of the property in contention to Z. and Z. gave a deed back to them which was held in escrow under conditions expressed in a written contract, the three papers are to be construed together and the transaction was held not such a transfer of title as to prevent their recovery in ejectment. *Conway v. Hart*, 20

2. *Right of party in possession to defend.*—A party found in possession of the demanded premises in ejectment is required by statute to be served though not named in the writ or such a party may accept service and should be noted by the prothonotary as a defendant. The order of Court adding such party to the record as a defendant is merely doing what the prothonotary should have done in the first instance. *Marshall v. Forest Co.*, 179

See ADVERSE CLAIM, 1, 6.

END LINES.

1. *Same for all veins.*—Where the end lines of a mining claim have been established, they remain the end lines as to all veins found within its surface boundaries. *St. Louis Co. v. Montana Co.*, 57

See APEX.

EQUITY.

1. *No equity case where defendant in possession.*—A federal court of equity is without jurisdiction of a suit to determine the title or right of possession to lands brought by one who is out of possession. *Cosmos Co. v. Gray Eagle Co.*, 633

See TRIAL, 3.

ESCROW—See FRAUD, 5.

ESTOPPEL.

1. *The lessees of the owners of a lode cannot by going through the forms of law appropriate to themselves the property of their lessors.* *Lowry v. Silver City Co.*, 113

2. *A neighborly assistance about a well in process of drilling is not to be construed as a waiver of the party's contention that the parties had no right to sink such well.* *Lynch v. Burford*, 611

3. *The lessee of a mining claim cannot contest his lessor's title or take advantage of the fact that the claim is void for want of a valid discovery shaft.* *Bunker Hill Co. v. Pascoe*, 626

4. *Incorporating and placing company in possession.*—Where the locators of possessory claims surrender possession to a com-

ESTOPPEL. Continued.

pany in consideration of its stock issued to them and the corporation enters and makes expenditures without written evidence of transfer it takes title by estoppel. *Murray Hill Co. v. Havénor*, 668

5. *When estoppel exists it amounts to a transfer of title by "operation of law." Id.*

6. *Strangers to the title cannot plead the want of a formal transfer in such case. Id.*

EVIDENCE.

1. *Scope of cross-examination.*—A party has a right upon cross-examination to draw out anything which would tend to contradict, weaken, modify, or explain the evidence given by the witness on his direct examination, or any inference that may result from it tending to support in any degree the opposite side of the case. *Fissure Co. v. Old Susan Co.*, 125

2. *Hearsay evidence.*—In an action to restrain an alleged trespass to a mining claim, evidence of the plaintiff that a third party told him he could locate the mine in his own name was properly excluded as incompetent. *Regan v. Whittaker*, 309

3. *Where evidence was improperly excluded when offered, the error was cured by its subsequent admission. Id.*

4. *Evidence was not admissible to show that there was a parol understanding and agreement between plaintiff and defendant's assignor that, if there was a default in any of the payments, the lease should be reassigned to plaintiff, as it would contradict or vary the written agreement. Hardwick v. McClurg*, 412

5. *There was no ambiguity in the contract rendering the attendant circumstances and the acts and the declarations of the parties at the time admissible to explain it. Id.*

6. *Admission of evidence. Harmless error.*—It is harmless error to permit a question to be answered which calls for the conclusion of the witness, where the conclusion stated was conclusively established by other evidence introduced by the adverse party. *Portland M. Co. v. Flaherty*, 556

EXECUTORS AND ADMINISTRATORS.

1. *An administrator cannot maintain trespass for injuries to real estate of his intestate. Hook v. Garfield Co.*, 81

2. *Facts avoiding the above rule.*—But when the administrators brought suit in trespass; amended their petition by alleging assignment of the right of action from the heirs and defendants made no issue of misjoinder—it was error to direct a verdict for

EXECUTORS AND ADMINISTRATORS. *Continued.*

defendants and motion to substitute the heirs as plaintiffs should have been allowed. *Id.*

EXPERT.

1. *Question to.*—While it is true that an expert cannot be asked to give his opinion based merely upon the testimony heard by him, whenever there is a conflict in such testimony, yet, when the material facts are within such expert's own knowledge, and related by him in his own testimony, he may give an opinion based wholly upon such personal examination and knowledge, without having such facts hypothetically stated. *Wells v. Davis*, 1

FIXTURES.

1. *Improvements by option holder.*—Where a party enters on a mine under an option providing that his improvements revert to the owner in case of no sale he is liable for the removal of buildings which he placed on the ground and the owner was not bound to tender him a deed before action. *Cook v. Enright*, 496

2. *Lease silent, presumption of right of removal.*—The lessees in a mining lease may remove buildings and railroad tracks placed on the premises by them, where such removal causes no material injury to the freehold, and the lease is silent as to the right of removal. *Couch v. Welsh*, 619

3. *The law of fixtures is in derogation of the common law*, which made part of the realty everything attached to the freehold. *Id.*

4. *Fixtures defined. Buildings and track.*—Whatever is attached for purposes of trade or manufacture—which is removable without material injury to the soil—the removal of which is not contrary to usage and which when removed resumes its character as personalty, is the tenants fixtures. Buildings and track come within this definition. *Id.*

FOREST RESERVE.

1. *Exchange under Forest Reservation Act.*—Land subject to selection.—Public lands are "vacant and open to settlement," and therefore subject to selection in lieu of relinquished forest reserve lands covered by patent, under Act June 4, 1897 (30 Stat. 36), only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character. It devolves on the person making the selection to establish such facts by proof, so far as they are not shown by the records; and under the regulations

FOREST RESERVE. *Continued.*

of the land department adopted pursuant to such act, which have the force of law, and which require all applications thereunder to be "forwarded by the local officers to the commissioner of the general land office for consideration, together with report as to status of the tract applied for," the equitable title to such tract does not vest in the applicant until the approval of the selection by the department, and until such approval the selection is subject to be defeated by proof either that the land is in fact mineral in character, and therefore not "open to settlement," or that it was not vacant at the time the selection was made. *Cosmos Co. v. Gray Eagle Co.*, 633

FORFEITURE.

1. *Relief in equity to forfeited lease.*—The forfeiture clause in a gas and oil lease, under which a valuable estate vested in the lessee in so far as the rentals are concerned, made payable in gas, oil, and money, is in the nature of a penalty to secure such rentals, against which a court of equity will grant relief when compensation for such rentals can be fully made, and great loss wholly disproportionate to the injury occasioned by the breach of the contract would otherwise result to the lessee negligently, but not fraudulently, in default. *S. Penn. Oil Co. v. Edgell*, 106

2. *No forfeiture for nonpayment of rent.*—Where an oil lease provides for a rental during delay to operate it is fixed damages to be collected by suit and nonpayment does not work a forfeiture. *Marshall v. Forest Oil Co.*, 179

3. *Nonpayment not of itself abandonment.*—Where a lease provides for forfeiture upon abandonment of operations evidence of nonpayment of rent is admissible only as one item under all the circumstances on the issue of abandonment. *Id.*

4. *Waiver of first default.*—The fact that the owner might have taken possession on the first failure to work the mine, but did not do so, did not give plaintiffs the right to dispossess defendants under a grant from the owner's heirs. *Hosford v. Metcalf*, 198

5. *The burden of proof* is on the party alleging forfeiture and such proof must be clear and convincing. *Emerson v. McWhirter*, 470

6. *Advertising out co-tenant. Ninety days' notice.*—Publication in a daily paper for 85 consecutive days, held a compliance with R. S. § 2324, providing for forfeiture for non-contribution to annual labor, which requires a publication "at least once a week for ninety days." *Elder v. Horseshoe M. Co.*, 510

FORFEITURE. *Continued.*

7. *Newspaper nearest the claim.*—The "usual traveled route" is not the test by which to distinguish which is the newspaper published nearest the claim. *Haynes v. Briscoe*, 720

8. *Mailing copy of the paper containing the printed forfeiture notice* to the co-owner is not a service of notice under the act. *Id.*

9. *A notice of forfeiture on two claims* is fatally defective where "it does not specify the amount of money spent on each claim nor the facts which might excuse expenditure upon each claim." *Id.*

See ABANDONMENT; DISTRICT RULES, 4.

FRAUD.

1. *Attempt to exclude associate. Corporate knowledge.*—Where two associates began negotiations for the purchase of a mine upon which a company was to be organized and certain stock issued to them and one of them by false representations procured the contract in his own name and the company with full knowledge of the facts issued all the stock to him they became liable to the defrauded party for the value of half the stock at the time of its issue. *Sun Dance M. Co. v. Frost*, 252

2. *Acquiring antagonistic interests.*—Where a fiduciary relation is established between two, neither can acquire a sole interest antagonistic to the other. *Id.*

3. *No proof of actual fraud is necessary* where such fiduciary relation exists. *Id.*

4. *Procuring deed by.*—Where, by fraud and misrepresentation to defendants' agent, complainant procured the insertion of his name as purchaser in an order confirming an administrator's sale of an interest in a mine and in the administrator's deed, when defendants' bid was the only one received and acted on, a court of equity should not assist him to retain the benefit of his fraud by setting aside a subsequent deed, which the administrator was compelled to issue to defendants by mandamus in the state courts. *Hanley v. Sweeney*, 333

5. *Concealment of value. Tampering with escrow.*—The parties were partners in certain mining enterprises, and jointly owned an interest in a claim, in which complainant also owned a separate interest. Defendants, by tunneling from an adjoining mine, managed by them, discovered an extensive and valuable vein of ore in such claim, and, concealing such fact from complainant, procured an option on his interest, and execution and delivery in escrow of a deed therefor, and afterwards, by fraud, and without payment therefor, obtained possession of the deed. *Held*, that such deed should be set aside as fraudulent and void,

FRAUD. *Continued.*

both because of such concealment and because never delivered.
Id.

6. *Where parties in charge of mine owned by a corporation suppress a valuable discovery and prevent a stockholder from access to the mine, taking active steps to prevent his acquiring knowledge, it is a fraud upon proof of which a purchase of his stock should be set aside. Id.*

See ABANDONMENT, 1; CORPORATIONS, 2, 3; DISCOVERY, 7; ESTOPPEL, 1; TENANTS IN COMMON, 1.

INFANT.

1. *Suit by infant.*—Where a debt or demand is payable to infants, suit therefor is properly brought in their names by their next friend, although the money, when recovered, goes to their guardian. *Lawson v. Kirchner*, 683

INJUNCTION.

1. *Power to withhold injunction till plaintiffs do equity.*—The court has power in a proper case to withhold its injunction against the salt works parties until the complaining party make reservoirs to store water when there is a surplus so as to prevent either side being completely in the power of the other. *Strobel v. Kerr Salt Co.*, 39

2. *Judicial discretion on conflicting testimony.*—Where there is substantial evidence to sustain the plaintiff's contention as to the identity of the vein trespassed upon as he alleges, the discretion of the court below in allowing an injunction will not be reversed although the evidence to the contrary makes a sharp conflict. *Parrot Co. v. Heinze*, 98

3. *Against artificial pressure.*—In an action to enjoin the transportation of natural gas through pipes at a pressure in excess of the natural rock pressure by means other than the natural pressure of the gas flowing from the wells, as prohibited by §§ 7507, 7508, 7509, Burns 1894, it must be shown that plaintiff sustains, or is likely to sustain, some special injury, or that he or his property is exposed to some particular damage which the statute was intended to prevent. *Manufacturers' Co. v. Indiana Co.*, 194

4. *Discretion as to.*—On an issue as to where the lode goes to restrain the removal of ore in an apex case the plaintiff having substantial evidence of his contention the discretion of the court below in allowing the writ will not be controlled. *Parrot S. Co. v. Heinze*, 232

5. *The action of the court below in acting on the evidence*

INJUNCTION. *Continued.*

as to granting the writ of injunction will be followed unless it clearly appears that he abused his discretion. *Maloney v. King*, 278

6. *No injunction to restrain working mines in foreign jurisdiction.*—The fact that the necessary parties are before a court of equity does not give it jurisdiction in proceedings to enjoin trespass and waste in a mine located in a foreign jurisdiction, where there is no further ground for equitable interference. *Lindsley v. Union Co.*, 586

7. *Continuous trespass enjoined.*—Injunction is the proper remedy for the prevention of trespasses and nuisances, which by reason of the persistency with which they are repeated, threaten to become of a permanent nature. *Keppel v. Lehigh Co.*, 605

8. *Action of court below on injunction.*—Where, on a motion for injunction to restrain defendant from interfering with plaintiff's alleged right to use one-half the waters flowing through defendant's tunnel, the evidence was conflicting as to the facts, and the trial court found the facts against the plaintiff, its order denying the injunction should not be reversed. *Cardell v. Comstock T. Co.*, 699

9. *Denial of previous like application by state court.*—An order of a state court refusing a preliminary injunction in a suit brought by a number of corporations jointly, in which no final judgment has been rendered, is not a bar to a subsequent suit in a federal court for an injunction by a successor to one of such corporations, which was not a party to the former suit, and against defendants for the most part different, and where the acts alleged as grounds for relief were committed after the former order was entered, although they are of the same general character as those relied on in the state court. *Reinecke C. Co. v. Wood*, 708

See STRIKES, 1; TAILINGS, 1.

INSPECTION.

1. *The owner of the surface has a right of access to the mine below the surface to see that his right of surface support is being maintained.* *Noonan v. Pardee*, 517

INSTROKE.

1. *Construction of lease with the holding that the instroke right to work other coal through the shaft on the demise continued after exhaustion of the leased coal.* *Madison v. Garfield Coal Co.*, 358

INSTROKE. *Continued.*

2. *Right to exercise at once.*—The privilege of instroke being granted generally, is presumably to be exercised at once, or at any time without waiting until the demised coal has been worked out. *Id.*

See RES ADJUDICATA, 1.

JUDGMENT.

1. *Presumption of valid judgment.*—The intendment of the law are that the judgments of courts of general jurisdiction are valid, and that he who attacks them must conclusively show their invalidity. *Eureka Hill Co. v. Eureka,* 131

JURISDICTION.

1. *Attempt to state federal question.*—A complainant cannot invoke the jurisdiction of a federal court by setting forth the contention which will be made by defendant in answering the bill upon which a federal question will arise. *Peabody Co. v. Gold Hill Co.,* 591

See ADVERSE CLAIM, 2; INJUNCTION, 6; STOCK, 2.

KNOWN LODE.

1. *Under the Placer Act of 1870* there was no reservation of known lodes and the entryman and patentee owned the entire premises without exception of lodes known or unknown. *Cranes Gulch M. Co. v. Scherrer,* 549

2. *After entry the right to patent is absolute* and the government cannot impose further conditions. Where on May 10, 1872, entry of a placer had been made and the patent which followed excepted known lodes under a section of the act of that date the excepting clause was a condition which the land office could not impose and was void. *Id.*

See TOWN SITE, 1.

LACHES—See PATENT, 5.

LAND OFFICE.

1. *Contest pending in land office.*—The federal courts are without jurisdiction to entertain a suit to determine the respective rights of the parties in land the title to which remains in the United States, and in regard to which a contest between the parties is pending in the land department. *Cosmos Co. v. Gray Eagle Co.,* 633

2. *The action of the land office as to sufficiency of proofs on a*

LAND OFFICE. Continued.

patent protest cannot be reviewed by the courts. *Neilson v. Champagne Co.*, 664

See TENANTS IN COMMON, 2.

LATERAL SUPPORT.

1. *Evidence that the cave was caused by removal of lateral support by defendants mining in the neighborhood is not admissible under a pleading charging only vertical support. Noonan v. Pardee*, 517

2. *The law of lateral and of surface support differs in certain respects and the measure of damages is not the same. Id.*

See SURFACE SUPPORT.

LEASE.

1. *Superintendent ordering lessee to quit.*—Plaintiff took a lease from defendant company, the lease providing for surrender of possession in case of sale or transfer of the property. After the lessee had struck pay ore, the superintendent falsely told him that the mine was sold and to quit the premises, which he did. *Held*, that plaintiff was justified in relying on the notice received. *Ober v. Schenck*, 460

2. *Where the company refused to reinstate on demand, it assumed the consequences of the superintendent's unauthorized act. Id.*

3. *"Sale or transfer."*—A transfer under such clause means a transfer of title, not a transfer of possession, and does not cover a mere option to purchase with right of possession during option. *Id.*

4. *A conveyance of coal in place is not necessarily a sale, and the rules applicable to sales, are not to be applied indiscriminately to instruments which are leases, though in fact sales in form. Each instrument is to be construed like any other contract by its own terms. Denniston v. Haddock*, 513

5. *Time in a lease in respect to the length of the term is a limitation of the estate, and always of the essence of the conveyance. Id.*

6. *The addition of an optional right of purchase to the ordinary terms of a mining lease does not make the agreement a contract of sale but a lease with the usual incidents of a lease. Couch v. Welsh*, 619

See FIXTURES; FORFEITURE; INSTROKE, 1; MEASURE OF DAMAGES, 6; OIL; RENTS AND ROYALTIES; RES ADJUDICATA, 1; RESERVATION, 1, 2; TENANT FOR LIFE, 1; TRESPASS, 1; VENDOR AND PURCHASER, 1.

LICENSE.

1. *Not confined to mineral at the time intended to be mined.*—Where the owner of land orally granted mining privileges therein to defendants at a time when mining operations in the locality were being conducted for lead only, and not for zinc, and defendants discovered zinc, which they did not mine for several years, because there was no market, such facts did not show that the license was contemplated by the parties as restricted to the mining of lead only, but the privilege extended to zinc. *Hosford v. Metcalf*, 198

2. *Expenditure under license makes it a property interest.*—A parol grant of mining privileges in land, on the strength of which grantees expended much money and labor in work on the premises, gave grantees an interest in the land, entitling them to continue, and which was transferable, and was not merely a personal license and revocable. *Id.*

3. *Revocation. Decease. Compensation.*—Such ripened license was not revoked by the decease of the granting party, nor could the heirs or their grantees revoke it by tendering compensation. *Id.*

LIEN.

1. *Lien on possessory claim.*—An unpatented mining claim being real estate, a judgment lien attaches to it, under Code of Civil Procedure, § 1197, declaring that from the time a judgment is docketed it becomes a lien on all real property of the judgment debtor. *Butte Hardware Co. v. Frank*, 368

2. *Transfer, no abandonment.*—A judgment lien on an unpatented mining claim is not lost by the transfer in writing of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer in writing of an unpatented claim does not amount to an abandonment. *Id.*

3. *Lien attaches to patented title.*—The holder of a lien is not obliged to adverse but after Sheriff's Deed delivered the lien is gone and the holder of the title so transferred must protect it by adverse. *Id.*

4. *Agreement between co-owners.—Lien limited to mine proceeds.*—The owners of a mine agreed that one owner should make certain improvement and acquire additional property, and that the other owners should not be personally liable for any part of the sum so expended, but that their interest in the mine should be chargeable with their proportion of such expenditure, and that such owners should be entitled to a certain interest in the entire property when the proceeds were sufficient to pay the sum so advanced and interest thereon, or when they paid their propor-

LIEN. *Continued.*

tion thereof. *Held*, that such contract did not give the owner making such improvements a lien for the advances on the interest of the other owners. *Frowenfeld v. Hastings*, 503

5. *Action to enforce lien distinguished from accounting.*—A complaint by a part owner of a mine against the other owners, stating that plaintiff and defendants were partners till a certain date, but not alleging the partnership thereafter, and stating facts tending to negative the existence of such partnership, and alleging advances made by plaintiff in improvements under a contract by which defendants were chargeable with a proportion thereof, and alleging a sum due thereunder, is an action to enforce a lien on the interest of defendants, and not an action for a partnership accounting. *Id.*

LOCATION.

1. *Lode location held good as placer.*—A record of a claim of the length and width of a lode claim, stating that it is "for Borate mining purposes," is good as a record of a placer claim. *McCann v. McMillan*, 6

2. *The claim must be marked upon the ground*, but its record is not required to recite or state such fact. *Id.*

3. *Prior locator prevails.*—The cardinal principle which governs the conflicting claims of parties appropriating the public domain is, other things being equal, that the prior locator prevails. *Conway v. Hart*, 20

4. *The locator may adopt old stakes found on the ground which stand in the proper places.* *Id.*

5. *Change of stakes by one co-owner.*—One of the owners, without consultation with his associates, after conversation with defendants, placed three stakes to indicate one of the lines of the claim. The other co-owners knew nothing about these stakes and the one who placed them shortly afterwards repudiated them: *Held*, no estoppel to claim beyond these stakes. *Id.*

6. *Where the plaintiffs' claim exceeded 1500 feet in length on the ground the court properly limited their recovery to the legal length of the lode.* *Id.*

7. *Facts of the case.*—*Sufficient staking and posting.*—Two adjoining mining claims were each marked at the corners by four stakes about a foot and a half long, flattened on two sides, and driven into the ground about four inches, two stakes being at the ends of the dividing line common to both claims. In the middle of the dividing line was a tree blazed on both sides, on one of which the notices of location were posted, describing the claims by courses and distances, running from the tree to a stake

LOCATION. *Continued.*

and from stake to stake to point of beginning. The ledge on each claim had been sufficiently developed to show its existence and direction. *Held*, that the location sufficiently complied with R. S. U. S. § 2324, requiring that a location must be distinctly marked on the ground, so that its boundaries can be readily traced. *Eaton v. Norris*, 205

8. *Where there is neither statute nor district rule* the validity of the location depends entirely upon whether it complies with the requirements of § 2324, the Congressional Act. *Id.*

9. *The ultimate fact of location.*—Whether it has been sufficiently marked on the ground is for the jury or the trial court. But if there be a finding of specific facts to necessarily show such sufficient marking a general finding of location not made, must be disregarded. *Id.*

10. *All that the statute requires* is that the claims be marked distinctly on the ground without regard to the mode. *Id.*

11. *Running the lines of a lode claim over a prior mill site* is not an initiation of title by trespass. *Cleary v. Skiffch*, 284

12. *Compliance with State Law must be proved.*—Where defendants were in actual possession of mining ground at and before the institution of suit, under a location the validity of which was attacked by the plaintiff only on the ground of a previous location, the burden was upon plaintiff to show that such previous location was made and perfected in compliance not only with the laws of the United States, but also with such provisions of the statutes of the state relating to the location of mining claims as are not inconsistent with the United States statutes. *Copper Globe Co. v. Allman*, 296.

13. *Must mark bounds and record within 30 days.*—To perfect a mining location, the locator must within 30 days, and in the manner prescribed by section 1497, Rev. St. 1898, mark the boundaries of his claim substantially as indicated by the discovery monument and notice of location; and within the same time as required by section 1498, *Id.*, he must file for record with the county recorder of the county wherein the claim is located a substantial copy of the notice of location. *Id.*

14. *The right of a state to pass acts supplementing the mining act of congress* in respect to the location of mining claims is recognized by section 2324, Rev. St. U. S. *Id.*

15. *First complete location takes title.*—A mining location is not perfected until all of the essential statutory requirements are performed. A locator of a mining claim only acquires exclusive right to the possession of the claim when all of the necessary requirements of a location are observed; and, if he neglects to perform any necessary requirements within the time prescribed

LOCATION. *Continued.*

by statute, his attempted location is of no avail as against an intervening location peaceably and regularly made and covering the same ground, although he shall have performed the neglected requirements after the inception of the second location. *Id.*

16. *Plaintiff's location not valid.*—Where it is clear from the evidence that no valid location of plaintiff's claim was made on the ground as found by the trial court, the decree in favor of the plaintiff must be reversed and a decree for the defendant ordered. *Id.*

17. *Assessment work no proof of.*—In an action to restrain a trespass to a mining claim, where the defendant alleged that the plaintiff had never made a valid location of the claim, evidence that plaintiff had performed assessment work on the claim was properly excluded as immaterial. *Regan v. Whittaker*, 309

18. *Proof of, on vacant land.*—In suit supporting adverse claim plaintiff must show as one of the material facts that his location was made on unoccupied and unappropriated mineral domain subject to location. *Kirk v. Meldrum*, 393

19. *Initiation of title by trespass.*—Title cannot be initiated by entry upon a prior valid existing location. *Id.*

20. *Admission by locator.*—Defendant admitted that certain ground was vacant, though in fact it was occupied by him. Afterwards he filed an amended location certificate including such ground. In the absence of specific proof that the ground was taken up by plaintiff after the admission and before the relocation: *Held* no proof of a location by plaintiff on vacant ground. *Id.*

21. *If a location be not completed within the statutory time* it is immaterial if in fact completed at any time before the second locator appears on the ground. *Crown Point M. Co. v. Crismon*, 406

22. *Proving location by what is found on the ground.*—Where there was no evidence of the original marking of the boundaries, but there was found at the date of the attempted relocation, six years later, sufficient monuments to enable the boundaries to be readily traced, and the notices properly described the claim, the claimant holding actual possession under chain of title from the alleged locators, that is sufficient proof of location as against a party attempting to relocate the claim. *Yreka M. Co. v. Knight*, 478

23. *Where plaintiff is in possession of a mine as successor* in interest of the locator the facts above recited amount to *prima facie* evidence of the location sufficient to justify a verdict against one who, knowing of such location, relocated the mine on the claim that the mine had been abandoned and no work done thereon during the preceding year. *Id.*

24. *A question of law.*—Where defendant had complete evidence

LOCATION. *Continued.*

of a valid location prior to any valid location of plaintiff, to instruct the jury that the validity of such location is left to their determination is erroneous and necessitates a new trial, on a verdict against the validity of such location. *Brown v. Oregon King Co.* 485

25. *Trespass on rightful possession.*—A valid location of public land cannot be instituted while another has the possession and right of possession under an earlier lawful location. *Thallmann v. Thomas,* 573

26. *No location by forcible entry.*—A valid claim to public land cannot be initiated by forcible entry upon it, even while it is in the possession of one who has no right to the possession, and no lawful claim to secure the title. *Id.*

27. *Entry upon possession without title.*—Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry and location thereof while it is in the possession of those who have no superior right to acquire the title or to retain the possession. *Id.*

See ALIENS; DISCOVERY; DISCOVERY SHAFT; END LINES; POSSESSION, 23, 27.

LOCATION CERTIFICATE.

1. *Liberal construction to miner's notice.*—The law will not hold the locator of a mining claim to a strict and technical observance of the statute in respect to the terms of his notice, so long as he substantially complies with its requirements; and if it appears that the location was made in good faith, and by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient. *Wells v. Davis,* 1

2. *Location notices are to be liberally construed*—bounding on one adjoining claim and general topographical reference held good. *McCann v. McMillan,* 6

3. *An affidavit to a mining location notice* must be sworn to before an officer authorized by law to administer oaths. *Van Buren v. McKinley,* 690

4. *Verification to location notice.*—The provisions of section 3104, Rev. St., and amendments thereto, requiring an affidavit to be attached to a mining claim location notice, is not in contravention of the provisions of section 2322, Rev. St. U. S. *Id.*

See RECORD.

LOCATION NOTICE.

1. *Indulgent construction*.—A miner's posted notice is to be liberally construed. *Talmadge v. St. John*, 13
2. *Name of county omitted*.—Where the preliminary notice named the county, and the final certificate referred to the preliminary notice, the fact that the final certificate omitted to name the county will not defeat the object of the notice. *Id.*
3. *A description by its own stakes and monuments*, without reference to other object or monument, held sufficient. *Id.*
4. *The construction of a notice for a mining location should be liberal and not technical*, and the sufficiency of a notice with reference to natural monuments or permanent objects is a question of fact. *Fissure Co. v. Old Susan Co.*, 125
5. *The place where the notice of location of a mining claim is posted* is the initial point on the lode of the United States survey of the claim, and from which the boundaries of the claim can only be determined when it is 600 feet in width. *Copper Globe Co. v. Allman*, 296
6. *A district rule called for two notices*—one at each end of the claim. Only one notice was posted: Held not a fatal defect. *Emerson v. McWhirter*, 470

LODE.

1. *The word lode construed by the context to mean lode mining claim*. *Buckeye Mining Co. v. Carlson*, 499
See APEX; CROSS LODE; END LINES; TUNNEL.

MASTER AND SERVANT.

1. *Two superintendents in separate tun els*.—The fact that two men were working for the same mining company would not make them fellow servants, when they were employed in separate tunnels under different superintendents, where no supervision of each other's work was possible and no opportunity afforded to use precautions against each other's negligence. *Uren v. Golden Tunnel Co.*, 243
2. *Limitation on usual risks*.—The rule that an employee cannot recover for an injury received from a danger which is naturally and necessarily incident to work he is hired to do, and which is apparent to a reasonably prudent man, is not applicable to a case where a miner working on a tunnel of defendant in a narrow gulch, some eight hundred feet below another tunnel operated by defendant, is injured by a rock thrown from the upper tunnel, when it had not been customary to roll them down that particular gulch, and they could have been disposed of by throwing them down another gulch, where no work was going on. *Id.*
See MINERALS, 4, 5; NEGLIGENCE.

MEASURE OF DAMAGES.

1. *Against negligent trespasser.*—One who, through negligence or inadvertence, mines coal belonging to another is liable for the value of the coal so mined in its severed condition, at the breast and is not entitled to any allowance for digging. *Donovan v. Cons. Coal Co.*, 88 Ill. App. 589, affirmed. *Donovan v. Cons. C. Co.*, 91

2. *Damages not excessive.*—Where a young man's foot was badly injured, and crushed so that some of the bones had to be extracted, the injuries confining him to a hospital for a month, and compelling him to go maimed through life, a verdict of \$8,500 was not excessive. *Uren v. Golden T. Co.*, 243

3. *For failure to furnish surface support* is the actual loss the owners of the surface have sustained to their land, including the buildings thereon by reason of the cave in. The difference in the market value, before and after the injury, in this class of cases, is not the true rule. *Noonan v. Pardee*, 517

4. *Measure of damages for failure to test for oil.*—Where a lessee covenants to test a well for oil and he fails so to do, and allows the lessor no opportunity to test for himself, the measure of damages on proof that oil would have been found is the full value of the royalty which such well should have produced to the lessor during the entire term. *McClay v. Western Pa. Co.*, 760

5. *Where unavoidable accident is a defense* to a breach of contract the plaintiff is still entitled to return of the actual consideration which he has outlaid. *Id.*

6. *Opportunity to lessor to test.*—Where a party fails to keep a covenant to test a well but he turns it over to the lessor under circumstances which would allow the lessor to make the test, the measure of damages is the sum it would have cost the lessor to make the test. *Id.*

See LATERAL SUPPORT, 2; TAILINGS, 3.

MILL SITE.

1. *Cannot be located upon mineral land* nor can it be subsequently patented upon mineral land whether the mill site be a separate application or applied for in connection with a lode. *Cleary v. Skiffich*, 284

2. *Test of value.—Time.*—To sustain the contention that it is upon mineral land, the lode claimant must show that it contains sufficient mineral of such value as to justify working at the date when the mill site was located. *Id.*

See APPURTENANCES.

MINERAL LANDS.—See MILL SITE, 1.

MINERALS.

1. *Clay—whether or not mineral.*—Though a mineral prima facie includes anything lying under the land which has a value of its own as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted only by virtue of a statutory reservation. *Great Western Ry. Co. v. Blades*, 425

2. *Clay forming the surface or subsoil* and constituting "the land" purchased for the purposes of the undertaking is not a "mineral" within § 77 of the Railway Clauses Consolidation Act, 1845, as interpreted by *Lord Provost and Magistrates of Glasgow v. Farie*, (1888) 13 App. Cas. 657. The same clay may be a mineral in one district and not in another. *Id.*

3. *A laborer employed to grade for the foundation of a mill found a pocket of free gold.*—The ground was public domain and although the defendant was about to build a mill he had not yet made a location. *Held*, that the laborer had the finder's right, good against all the world except the true owner. *Burns v. Clark*, 489

4. *"By virtue of his employment."*—The employer was not entitled to the gold under code § 1985, giving to the employer what his servant acquires "by virtue of his employment." *Id.*

5. *Had the employment of plaintiff been to mine* his find would have been the property of the employer, but he was employed to do work of a wholly different character and on ground which for the mill site purpose intended must be non-mineral ground. *Id.*

MINING CLAIM.—See *LODE*, 1; *PUBLIC DOMAIN*, 2.

MISTAKE.—See *PATENT*, 4.

NATURAL GAS.

1. *State cannot prohibit transportation from State.*—The act of 1889 (Acts 1889, p. 369), in so far as it attempts to prohibit the owner of natural gas from transporting the same by safe methods out of the State, contravenes the federal Constitution relating to interstate commerce, and is void, since natural gas, when reduced to possession, is an article of commerce. *Manufacturers Co. v. Indiana Co.*, 102

2. *Special injury to plaintiff must show in action under the Gas Pressure Act.*—A complaint to enjoin defendant from transporting natural gas through pipes at a pressure exceeding 300 pounds per square inch in violation of the provisions of the act of 1891, is insufficient where it is not shown that plaintiffs sustain any special injury peculiar to themselves by reason of the viola-

NATURAL GAS. *Continued.*

tion of the act aside from, and independent of, the general injury to the public. *Manufacturers Co. v. Indiana Co.*, 139

3. *Allegation of special injury by forced pressure.*—A charge in a complaint to enjoin the transportation of natural gas that "in and by so transporting natural gas through the pipes at a pressure in excess of the natural rock pressure, and by such means and appliances other than the natural pressure of the gas flowing from the wells, the defendant has drawn, and is continuing to draw so heavily through its said wells upon said reservoir as to seriously diminish the supply and pressure of gas therein" is not equivalent to an averment that an unnatural flow of gas from the wells was induced by means of the machinery or appliances used by defendants, or that such unnatural flow was a necessary consequence of the use of the machinery and appliances so used. *Id.* 194

4. *Interference with stop cocks.*—The statutory offense of turning gas cocks on or off without the owner's consent forbids the act itself on grounds of public policy and the defendant may be convicted without proof of criminal intent. *State v. Moore*, 401

5. *Lessor no right to shut off gas.*—Where one executes a gas and oil lease on his farm to a company, and the company pipes gas from a well constructed on the leased premises to consumers, without right to do so, and in violation of the lease contract, the lessor has no right to turn off the gas from the line to prevent a wrongful act by the lessee, but must resort to his legal remedy. *Id.*

6. *Dangerous character.*—It is a matter of common knowledge that natural gas is a dangerous agency and of that fact courts take judicial notice. *Id.*

See INJUNCTION, 3; OIL.

NEGLIGENCE.

1. *Evidence under general allegation of negligence.*—Where the complaint in an action to recover for personal injuries contains a general allegation of negligence, any fact tending to contribute approximately to the injury is admissible in evidence thereunder. *Uren v. Golden Tunnel Co.*, 243

2. *Disputed facts not reviewed.*—Where there was evidence to warrant a finding that an employe was injured by a particular rock thrown down a hill by a mining company, such finding will not be disturbed on appeal. *Id.*

3. *Two men ascend foul up-raise.—The falling body of the upper man brings down the lower.*—Plaintiff, in an action to recover for an injury received in defendant's mine, alleged that,

NEGLIGENCE. *Continued.*

as he and another employe were climbing up the crossing stulls in an up-raise, the other man, who was above, was overcome by powder smoke, gas, and foul air, and fell, striking plaintiff, and causing him to fall and receive the injury complained of. The evidence showed that the up-raise was impregnated with foul air, the effect of which was to greatly weaken and debilitate any one inhaling it, and that this weakening and debility often came on very suddenly; that the other man was climbing ahead of plaintiff, and was an experienced miner, familiar with climbing stulls in up-raises; that something struck plaintiff, and caused him to fall; and that both men were found immediately after at the foot of the up-raise, one dead, and the other severely injured. *Held*, that it was a reasonable inference from such evidence that the injury resulted from the cause and in the manner alleged, which justified the submission of the question to the jury, and that such inference was sufficient to sustain a verdict so finding, rendered under proper instructions. *Portland Co. v. Flaherty*, 555

4. *Sending employees into blind up-raise filled with gas.—Contributory negligence.*—A mining company violated its duty in respect to providing its employes with a reasonably safe place in which to work, where, through its foreman, it directed employes to go into an up-raise known to be filled with gas and foul air, and is liable for an injury resulting from the effect of such foul air to the workman who was not guilty of contributory negligence. *Id.*

5. *Failure to use ventilator.*—Plaintiff, who was inexperienced in mining, was employed by defendant as a "trammer," to load and unload and wheel away dirt and rock in its mine. When he had been working in the mine three days, he was sent, with another workman, into an up-raise, known by the foreman to be filled with gas and foul air, to clear away dirt and rock. While climbing up, the other workman was overcome by the foul air, and fell, causing plaintiff to fall and receive severe injury. Plaintiff had been in the up-raise the day before, and knew that the air was bad, but also that there was a ventilating apparatus, which, when properly operated, clarified it so that it was not dangerous to work there. *Held*, that such facts shown by the evidence were sufficient to support a finding by a jury that plaintiff was not guilty of contributory negligence in obeying the orders of the foreman to go into the up-raise. *Id.*

6. *Harmless error in charge.*—A statement in the charge, in an action by a servant for a personal injury, that "it was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work," while technically inaccurate, because it failed to limit the requirement to a "reasonably" safe

NEGLIGENCE. *Continued.*

place, did not constitute prejudicial error, where it was so explained by the context that the jury could not have been misled, and especially where defendant practically admitted that the place where plaintiff received his injury was not reasonably safe, and denied having sent him there for that reason. *Id.*

7. *A statement by an employe, when he was hired, that he was a miner*, will not impute to him knowledge of dangers in a mine arising from the gross negligence of the master, but only those of a mine conducted with ordinary care and prudence. *Id.*

See MASTER AND SERVANT; SURFACE SUPPORT, 1, 7; TRUST, 4.

NON-SUIT.

1. *Sufficiency of motion for non-suit*.—Where the attention of the court is called to the fact that the lease in evidence gives the landlord no right to the fixtures the motion for non-suit is sufficiently specific in stating the grounds thereof, in a suit against the tenant for removal of such fixtures. *Couch v. Welsh*, 619

2. *Directing verdict for defendant* instead of allowing the non-suit moved for is not commendable practice, but is harmless error where the plaintiff affirmatively shows that he has no case. *Id.*

See ADVERSE CLAIM, 5.

NOTICE.—See TRUST, 3.

NUISANCE.

1. *The doctrine that relaxes the ordinary rules governing the rights of riparian owners in favor of great industries* engaged in the development of the natural resources of the country has never been adopted by the Court of Appeals of this state, and no public necessity exists therefor. *Strobel v. Kerr Salt Co.*, 38

2. *Pollution of stream by salt works*.—Where a salt manufacturer adjacent to a flowing stream draws water therefrom in such quantity as to diminish its flow, and in using it in his operations renders the rest of the stream so salty as to unfit it for use by lower riparian owners, such use of the stream is such an unreasonable one as entitles lower riparian owners to restrain it, since they are entitled to a fair participation in the use of such water, which cannot be abridged by the convenience or necessity of the business of an upper riparian owner. *Id.*

3. *Others doing same thing*.—In an action by lower riparian owners to restrain a salt manufacturer from polluting a flowing stream with salt, the fact that other manufacturers are doing the same as defendant cannot preclude relief. *Id.*

NUISANCE. *Continued.*

4. *Legitimate uses enumerated.*—Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. *Id.*

5. *Common interest of several plaintiffs.*—Lower riparian owners having land separate from that of each other, abutting on the same stream, may sue jointly to restrain the pollution of the stream, as they all have a common grievance for an injury of the same kind. *Id.*

See TAILINGS.

OFFICER.

1. *There can be no officer de facto*, where there is no office.
Van Buren v. McKinley, 690

OIL.

1. *Lessee draining the demised ground by wells on adjoining ground.—Measure of damages.*—Where a lessee instead of drilling a well and operating the land in accordance with the lease, drills a well on adjoining property which he controls, in such a way as to drain the oil and gas from under the leased land, the measure of the lessor's damages is royalties on a portion of the oil produced through the well, ascertained by comparing it with the total production through the well, in the same proportion as the lessee's land within the circle drained bears to the whole area of drainage, the oil producing capacity of every part of the area being the same. *Kleppner v. Lemon*, 275

2. *In such a case the rule as to the wrongful confusion of goods* should not be applied so as to give to the plaintiff royalties on all of the oil produced through the well, it being possible approximately to determine the amount of oil drawn from the lessor's land. *Id.*

3. *Fishing for tools an ordinary risk in oil sinking.*—In an action to recover for the drilling of an oil well, which was made under a written contract by which the plaintiff agreed to complete and clean the well and deliver it to defendant for a stipulated price per foot, he cannot recover for time lost in fishing for tools in such well, the necessity for which was one of the

OIL. *Continued.*

risks he assumed by his contract. *S. Penn Co. v. Latshaw*, 600

4. *Lessor no right to sink within fire reserve.*—A lease for oil and gas purposes was subject to a reservation that no well should be sunk within a certain area enclosing buildings "as a protection against fire." *Held*, that the lessor had no right to drill a well within the limits of such reservation. *Lynch v. Burford*, 611

5. *Rent till well completed.*—A person who accepts an oil or gas lease, with a stipulation therein contained to pay a monthly rental until a well is completed, or until the expiration of a certain fixed term, is bound to pay such rental, although he does not, within such term, enter upon the land and complete such well, unless he was prevented from doing so by the plaintiffs, and not by mere personal default. *Lawson v. Kirchner*, 683

6. *Title under an oil and gas lease is inchoate* and for purposes of exploration only until oil or gas is found. If it is not found no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract. *Calhoon v. Neely*, 754

7. *Fugitive nature of oil.*—On breach of a contract to take out mineral, the fact that the mineral remains in the ground goes to reduce the damages, but this rule cannot apply if the mineral be oil and there are other wells which are draining it off. *McClay v. Western Pa. Co.*, 760

See MEASURE OF DAMAGES, 4.

OPTION.—See LEASE, 3.

PARTIES.—See NUISANCE, 5.

PARTNERSHIP.

1. *The majority of the members of a partnership may*, in case of diversity of opinion, manage the business as they see fit, acting in good faith, and within the powers necessary to the management, and not withheld by the articles of partnership, without being liable for losses which could not be foreseen. *Markle v. Wilbur*, 532

2. *Tunnel and superintendent's home are legitimate expenditures.*—A partnership consisting of seven persons was organized to conduct the business of mining coal. The shares were divided into sixteenths, and the term of the partnership was for twenty years. On a bill in equity by two of the partners representing three and one-half sixteenths against the other partners for an

PARTNERSHIP. *Continued.*

account, it appeared that one of the plaintiffs was a woman, and the other was engaged in banking in a distant state. Three of the defendants were practical men in the coal business and one of them, who acted as manager or superintendent, was an educated mining engineer of large experience. The evidence showed no bad faith or fraud in the management of the business. The plaintiffs claimed that the defendants should account for a very large expenditure on a tunnel over a mile long, for the cost of a dwelling house for the superintendent, for a salary of \$10,000 a year of an assistant superintendent, and for various other matters of expenditure. The evidence showed that the large expenditure for the tunnel was due to unforeseen conditions in the strata, impossible to determine beforehand; that the house was occupied by the superintendent who paid an annual rental which equaled six per cent of its cost. As to other items explanation was made tending to show that they were necessary to carry on the business successfully and for a profit. *Held*, that the defendants were under no duty to account. *Id.*

3. *Sale of interest without retiring.*—Where partnership articles provide a partner may sell his interest to another partner without a dissolution of the firm, and one partner sells his interest to another, but stipulates that he shall retain title to the interest until it is paid for, the other partners cannot object to the vendor continuing to participate in the management of the business, if the vendee does not object. *Id.*

PATENT.

1. *Private person cannot maintain bill to cancel patent.*—A bill of complaint by a private individual to vacate and annul a patent for land issued by the government cannot be maintained if it does not show that complainant is or was entitled thereto, though it may appear that respondent was not, since the mere cancellation of a patent, with reversion to the government, rests solely with the latter. *Peabody Co. v. Gold Hill Co.*, 151

2. *The owner of a patent issued under the Act of 1866 is entitled to all the rights which would attach to his mining location under the Act of 1866 and to any additional rights which enured to such location under the Act of 1872.* *Argonaut Co. v. Kennedy Co.*, 163

3. *Is proof of discovery and cannot be collaterally attacked by evidence that at the date of the subsequent location of a tunnel site no ore had been discovered in the lode claim.* *Calhoun M. Co. v. Ajax M. Co.*, 381

4. *Mistake in patent.*—*Proof beyond reasonable controversy.*—

PATENT. *Continued.*

Patents, contracts, and conveyances, the accredited evidences of rights and titles, may not be set aside or modified for mistakes unless those mistakes are established by evidence that is plain and convincing beyond reasonable controversy. *Thallmann v. Thomas*, 573

5. *Excess of width in lode patent.—Delay to attack.*—A patent for mineral lands, which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of the granted premises solely for the reason that upon its face it purports to be based on a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts. *Peabody Co. v. Gold Hill Co.*, 591

6. *Presumption in aid of patent.*—Where there might have been circumstances which, under existing laws, would have authorized the land department to include in a patent for mining ground all the ground therein described, it will be presumed in support of the patent, when collaterally attacked, that such circumstances existed. *Id.*

7. *Subsequent locator has no status.*—A suit to set aside a patent for mineral lands on the ground of fraud practiced on the land department cannot be maintained by a private individual, who had at the time no claim upon any of the lands, but made a location thereon subsequently, such ground of invalidity being available only to the United States. *Id.*

8. *Same—grounds for cancellation of patent—fraud.*—Allegations in a bill for the cancellation of a patent for mineral lands that the several claims embraced therein were falsely and fraudulently represented by defendant to the land department to be quartz claims, when they were, in fact, placer claims, afford no ground for the cancellation of the patent, where the fact that they were placer claims would not have precluded the owner from obtaining a single patent therefor, and it is not shown that the government was in any way injured by the false representation. *Id.*

See APEX; END LINES; KNOWN LODE, 2; LAND OFFICE, 2; STATUTE OF LIMITATIONS, 1.

PLACERS.

1. *The area of a placer location* is limited to twenty acres to each locator, but a number of individuals may locate a claim in

PLACERS. *Continued.*

common, not exceeding twenty acres to each person, and not to exceed one hundred and sixty acres in any one claim. *Kirk v. Meldrum*, 393

2. *Sufficient description of placer location.*—A sufficient location of placer mining claims is made by notices upon a stump in a creek, of a claim running 1,500 feet along the creek bottom and extending 300 feet each way from the center of the creek, adding that it is an extension of another claim named, a certain distance from the first falls on said creek. *McKinley Creek Co. v. Alaska Co.*, 730

See KNOWN LODES.

POSSESSION.

1. *The actual and visible prior occupation* of the premises with boundaries defined by stakes avoids the attempted location of the later claimant. *Talmadge v. St. John*, 13

2. *Continued possession* of the ground staked and actual knowledge by the later contesting parties "in some degree" supports the proof of location. *Eaton v. Norris*, 205

3. *Deeds prove possession.*—Where plaintiff produced deeds for mining claims from the persons who located the mines more than six years before the trial, and showed its actual possession for the last two years, a verdict that it and its predecessors had been in possession for six years was justified as against a defendant claiming the mines as abandoned. *Yreka M. Co. v. Knight*, 478

4. *Allegations as to defendant's mining an admission of his possession.*—Averments in a bill that defendant has drilled oil wells on the land, and is taking oil therefrom, against which an injunction is prayed, are, in effect, averments that defendant is in possession, and render the bill subject to demurrer, as in purpose and effect an ejectment bill. *Cosmos Co. v. Gray Eagle Co.*, 633

5. *Occupancy by explorer for minerals.*—Land was not "vacant and open to settlement," and subject to selection under such act, where at the time of the application it was in the actual occupancy of others engaged in exploring it for oil, under oil placer mining locations previously made by them, although such locations did not appear by the records of the local land office, and although they were not valid as against the United States, because there had been no previous discovery of oil on the land, where the locators prosecuted the work of exploration with due diligence, and with the result of discovering oil in paying quantities before

POSSESSION. *Continued.*

the selection by the applicant under the forest reserve act had been approved by the land department. *Id.*

See EJECTMENT, 2; EQUITY; PROSPECT, 1; QUIET TITLE, 1, 2.

PRACTICE.—See NON-SUIT; TRIAL; VARIANCE.

PRACTICE APPELLATE.

1. *Defective abstract.*—If the abstract filed by appellant does not fully present the case and the appellee fails to use his privilege of filing a supplemental abstract the Court will not go to the original transcript to find the facts of the case. *Niles v. Kennan*, 33

2. *When the chancellor has considered conflicting evidence*, and made his finding and decree thereon, they must be taken to be presumptively correct, and will not be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence. *N. Am. Exploration Co. v. Adams*, 65

3. *The court will not investigate alleged errors* where counsel fail to show that they were prejudicial to his client. *Parrot Co. v. Heinze*, 98

4. *Praying inconsistent instructions.*—A party cannot complain of the refusal of an instruction which states the law differently from another instruction prayed by the same party and given. *Healey v. Rupp*, 117

5. *Where there is evidence to support the findings*, the weight of such evidence being within the province of the trial court, its determination thereof will not be disturbed on appeal unless manifestly erroneous. *Fissure Co. v. Old Susan Co.*, 125

6. *Error not urged below.*—Where evidence as to the incompetency of a mine superintendent was admitted without objection, and the defendant tried its cause on that issue, it cannot urge on appeal that the court erred in submitting the question to the jury. *Uren v. Golden Tunnel Co.*, 243

7. *Where errors specified were not argued or referred to in the brief on appeal*, they are waived. *Maloney v. King*, 278

8. *Appellate practice.*—Under Comp. Laws, § 5090, subd. 4, providing that a motion for a new trial on the minutes of the court shall be denied if the notice does not specify wherein the evidence was insufficient to support the finding, the supreme court, in reviewing an order overruling a motion for a new trial on the minutes, will not review the evidence as to its sufficiency.

PRACTICE APPELLATE. *Continued.*

where the notice of motion did not specify the particulars in which the evidence was insufficient. *Regan v. Whittaker*, 309

9. *Facts of the case.—Defective allegation of title.*—A complaint alleged that plaintiff had a docketed judgment against R., and that certain unpatented mining claims were conveyed by deed absolute from D. to R. who on the same day gave a quit-claim deed to F., and that the property was sold to plaintiff at judgment sale. F. was in the possession of the property at the time the quit-claim deed was made. *Held*, that there being neither an allegation that R. ever owned any of the property, nor that F. ever got any property or title from him, and there being an implication of doubt as to the title from R., owing to his having given a quit-claim deed to one in possession, the complaint was insufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title to the claims. *Butte Hardware Co. v. Frank*, 368

10. *Wrong reason for right ruling.*—If the act of the trial court in sustaining a demurrer was right, such act must, on appeal, be sustained, notwithstanding the trial court in sustaining the demurrer may have given a wrong reason. *Id.*

11. *Silence of counsel* is not necessarily a restriction on the power of the court to adjudicate upon defects found by the court. *Id.*

12. *On a ruling excluding evidence* the record must show that the rejected evidence was material. *Kirk v. Meldrum*, 393

13. *Exceptions taken outside of the court room* by leave of the court though without consent of opposing counsel are irregularly taken and will not be considered. *Ober v. Schenck*, 460

14. *Decree of lower court presumptively correct.*—Where a chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be deemed to be presumptively correct in an appellate court; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed. *Thallmann v. Thomas*, 573

15. *Motion for new trial not reviewable.*—Under the practice of the federal courts, the ruling on a motion for new trial is not reviewable. *S. Penn Co. v. Latshaw*, 600

16. *The refusal of instructions asked* cannot be reviewed on appeal unless the bill of exceptions contains the evidence relied on to make such instructions applicable to the case as submitted to the jury. *Id.*

17. *Errors not excepted.*—Where but a single exception was taken, and a single assignment of error is made, covering the giving of certain instructions the refusal to give others, and the

PRACTICE APPELLATE. *Continued.*

charge as given, no question is presented which will be considered by the appellate court. *Id.*

18. *In an equity case* the Supreme Court will look into the evidence to determine the correctness of the decree. *Bunker Hill Co. v. Pascoe*, 626

19. *Findings of fact* not clearly against the preponderance of the evidence will not be disturbed on appeal. *Murray Hill Co. v. Havenor*, 668

20. *Where there is a substantial conflict in the evidence*, the appellate court will not disturb the verdict of the jury. *Van Buren v. McKinley*, 690

21. *No error on advisory verdict.*—Assignments of error based upon the refusal of instructions in a suit in equity in which the verdict is only advisory to the court cannot be entertained on appeal. *McKinley Creek Co. v. Alaska Co.*, 730

22. *A finding by the court on a question of fact* upon which the evidence is conflicting cannot be rejected on appeal. *Id.*

PROSPECT.

1. *Prospector's possession valid.*—Until by such approval an applicant is vested with the equitable title to the land, it remains subject to exploration for minerals under the mining laws; and, while lawfully occupied by one engaged in making such exploration, it is not "vacant," within the meaning of the act; nor is it open to settlement where, as the result of such exploration, its mineral character is established, while the title, both legal and equitable remains in the United States. *Cosmos Co. v. Gray Eagle Co.*, 633

See POSSESSION, 5.

PUBLIC DOMAIN.

1. *Proof of public unoccupied domain.*—Evidence that before the first location of plaintiffs' claim the land was unoccupied by anybody, and was vacant government land; that before their second location plaintiffs worked the claim for several years, placed stakes around it, sunk a shaft, and took out rock; and that when they made the second location they found the stakes, shaft, and claim in substantially the same condition as when they left it,—is sufficient to show that the land was vacant public land when the second location was made, as against a subsequent locator asserting no title antedating his location. *Conway v. Hart*, 20

2. *Proof of claim on vacant public domain.*—As the location of a mining claim must be upon the unoccupied public domain

PUBLIC DOMAIN. *Continued.*

and there is no proof that the plaintiff's location was upon unappropriated mineral lands the defendant was entitled to an instruction that plaintiff could not recover. *Cleary v. Skiffich*, 284
See FOREST RESERVE.

QUIET TITLE.

1. *Plaintiff in possession* may maintain suit to quiet title against another who is asserting title to the same ground. The rule applied on the facts to a case where plaintiff had worked a claim for several years and defendant had recently entered and made a location. *Crown Point M. Co. v. Crismon*, 406

2. *Title of third party when immaterial.*—Where the plaintiffs in a suit to quiet title to a mining claim had been in actual possession for a number of years, a defense that a claim prior to plaintiff's had never been abandoned cannot be urged, the defendant not claiming title under such prior claimant; Civ. Code, § 1006, providing that occupancy for any period confers title except as to those claiming by prescription, transfer, will, or succession. *Ramus v. Humphreys*, 450

RECORD.

1. *Temporary district recorder.*—Under the provisions of § 3103, Rev. St., a county recorder may appoint a deputy recorder at any place in his county where he may deem it necessary, and at all places 10 miles distant from an existing office, when 10 or more mining locators interested, petition for the appointment of a deputy; and, upon the failure of the recorder to appoint a deputy within 10 days after receiving such petition, the resident miners of such district may appoint temporarily a recorder of such district. *Van Buren v. McKinley*, 690

2. *No deputy.*—A district recorder appointed by the resident miners has no authority to appoint a deputy, and the person so appointed has no authority to administer oaths. *Id.*

See DISTRICT RULES, 1; TUNNEL, 2.

RELOCATION.

1. *Where there was no failure on the part of the original locators to perform the labor the regularity of the relocation becomes wholly immaterial.* *Wright v. Killian*, 211

2. *The statutory right to file amended record* applies to all classes of mining claims and therefore includes placer claims. *Kirk v. Meldrum*, 393

3. *Second claimant no jumper.*—Where an attempted location

RELOCATION. *Continued.*

is invalid a second party has a right to locate the ground and his knowledge of the previous attempted location is not admissible to place him in the light of a trespasser or jumper. *Brown v. Oregon King Co.*, 485

4. Admission of the prior claimant's location notice in such case is prejudicial error. *Id.*

5. There can be no relocation after entry of a claim for patent in the U. S. Land Office. *Neilson v. Champaign Co.*, 664

RENTS AND ROYALTIES.

1. A lessee who by payment of minimum royalties has paid more than the royalty per ton would amount to, after he accepts a new lease cannot offset such past payments against the royalties accruing under the new lease. *Denniston v. Haddock*, 513

2. Minimum screen.—Where a lessee is allowed free all coal which passes through a certain sized mesh he cannot be required to pay royalty on such coal although he puts it through a smaller mesh and markets it. It is not screened coal within the meaning of the clause calling for royalty on all coal screened. *Johnston v. Filer*, 741

See OIL, 3; RESERVATION, 1, 2.

RES ADJUDICATA.

1. In a prior suit for injunction wherein the right of lessee to work by instroke had been denied by the plaintiff but his bill was dismissed on the merits: Held a final adjudication on the construction of the lease. *Madison v. Garfield Co.*, 358

RESCISSION.—See VENDOR AND PURCHASER, 3-5.

RESERVATION.

1. Reservation of perpetual royalty.—M. and husband conveyed by deed to H. 52 acres of land in fee, which deed contained this provision: "The parties of the first part reserve unto themselves, and do not convey by this deed, the equal one-half part of the usual royalty of one-eighth of all the petroleum or oil in and underlying the tract of land hereby conveyed." Held to be an exception from the operations of said deed, reserved to the grantors, of the title in fee to the one-sixteenth of the oil in place in and underlying said tract of land, and to be delivered to her when produced as royalty, without expense to her for production. *Harris v. Cobb*, 263

2. Oil lease held subject to double royalty.—H. afterwards

RESERVATION. *Continued.*

leased said tract of land to L., with the exclusive right to operate and drill for oil and gas, reserving one-eighth part of all the petroleum obtained from said premises as produced in the crude state, to be set apart in the pipe line running said petroleum to the credit of lessor. *Held* to be a reservation to the lessor of the one-eighth of the oil which was vested in her, and did not refer to or include the one-sixteenth which was outstanding in M. *Id.*

3. *Private and statutory reservation distinguished.*—The principles governing cases like *Hext v. Gill*, (1872) L. R. 7 Ch. 699, which deal with a reservation of minerals by virtue of a grant or contract, are not applicable to the determination of cases arising out of a statutory reservation of minerals, like that contained in § 77 of the Railway Clauses Consolidation Act, 1845. *Great Western Ry. Co. v. Blades*, 425

SALE.—See LEASE, 4, 6.

SPECIFIC PERFORMANCE.

1. *Lease of undivided half.*—The Court will decree specific performance of an agreement for a lease of an undivided moiety of mineral property. *Hexter v. Pearce*, 143

2. *The whole doctrine of specific performance* rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted and is not bound to take damages instead. *Id.*

STATUTE.

1. *The local construction of a federal statute* cannot make a rule of property. Its meaning must be established by the construction of the Federal Supreme Court. *Calhoun M. Co. v. Ajax M. Co.*, 381

STATUTE OF LIMITATIONS.

1. *Five years bars U. S. to vacate patent.*—The act of March 3, 1891 (26 Stat. 1099), provides that suits by the United States to vacate and annul patents for land issued before its passage shall only be brought within five years from its passage, and hence, no suit having been brought within such time to vacate and annul a patent issued before its passage, the government is precluded from taking action thereafter. *Peabody Co. v. Gold Hill Co.*, 151

2. *Holding during period of limitation.*—The provisions of R. S. U. S. § 2332, that where parties have held and worked a claim

STATUTE OF LIMITATIONS. *Continued.*

for a period equal to the statute of limitations, they may be entitled to a patent in the absence of any adverse claim was intended to allow a prima facie case for patent under Land Office procedure but is not available as a defense against an adverse claim based upon a conflicting location. *Cleary v. Skiffich*, 284

3. *But proof of such possession may be sufficient to assume that a valid location of the claim so occupied had been made. Id.*

4. *When cause of action accrues.*—A cause of action arises for failure to afford the surface sufficient support at the time when the coal is removed without leaving sufficient support, and this is the case although the owner of the surface may have been ignorant of the violations of his right to support: *Lewey v. Frick Co.*, 166 Pa. 536, distinguished. *Noonan v. Pardee*, 517

5. *Where a mine operator fails to furnish sufficient support*, the right of action against him is barred after the expiration of six years. If the injury has been partly due to mining before six years prior to suit brought, and partly to mining after that date, the action will not be barred. *Id.*

6. *The date of a "cave in"* is not the date of the cause of action: that is only the consequence of a previous cause. *Id.*

7. *The right to sue passes to the surface owner* who is in possession when the subsidence occurs, without regard to the date of his conveyance; this right is barred by the statute of limitations if the cause of the subsidence arose more than six years before suit brought. *Id.*

8. *A mine operator is not liable for injury to the surface by default of his predecessor* in possession, though the surface does not show any injury till after he takes possession. *Id.*

9. *Runs with the land.*—A grantee of the surface may recover for injury thereto for failure of the mine operator to leave proper support, though such failure occurs before his deed, the effect on the surface appearing only after the deed. *Id.*

10. *New work.—Robbing pillars.*—Where the coal had been mined more than the statutory period without subsidence until the pillars had been robbed or a new seam worked within the statute, the action is not barred. *Id.*

11. *Amendment to take the case out of the statute of limitations by alleging new cause of action*, not allowed. *Id.*

STOCK.

1. *Corporation must use diligence to prevent unauthorized transfers of stock.*—It is the duty of every corporation to use reasonable diligence in each case to ascertain whether or not a transfer of stock requested is duly authorized by the former owner, to make

STOCK. Continued.

transfers so authorized, and to prevent those unauthorized; and for every breach of this duty it is liable to the injured party for the damage it inflicts. *Geyser-Marion Co. v. Stark*, 220

2. *Enforcement of personal liability beyond the state.—Subscribers held though stock not issued.—Money raised but mine not purchased.*—An option was held on a mine in Montana for \$30,000. Fifty-seven thousand dollars in stock was subscribed for and the \$30,000 given to a director to be paid to the owner of the mine, but the purchase was never consummated and the stock was not issued. *Held*, that the subscribers to the stock had never paid for the same and that they were liable to a judgment creditor of the company under the Montana statute. *Crowley v. Walton*, 629

STRIKES.

1. *Restraining armed camps of labor unions.*—At the instance of coal miners in Indiana and Illinois who were members of the organization known as the United Mine Workers, such organization undertook to secure the adoption of a certain scale of wages, which it had fixed, in the mines of Kentucky. Certain of the operators there, who employed union miners, agreed to adopt such scale, provided it was also adopted in a majority of the mines in another mining district of the state, in which the miners were nonunion men. The relations between the latter and their employers were harmonious, and the wages paid satisfactory; and, for the most part, they did not desire to join the union. Under such circumstances, defendants and others, representing the miners' organization, invaded the district in large force, and established camps of armed men near the mines, for the purpose of threatening and compelling the miners therein to join the union by a display of force, and of compelling a strike unless the union scale of wages was adopted. These camps were maintained for many months, the occupants threatening and even assaulting miners who refused to join the union. Both employers and miners resented such actions, and took measures of defense and retaliation; the result being conflicts and acts of violence. *Held*, that the acts of defendants and their associates in establishing and maintaining such camps constituted an unlawful invasion of the rights of both mine owners and miners, which resulted in and threatened irreparable injury, and that it was the duty of a court to enjoin the same on application by a mine owner affected. *Reinecke C. Co. v. Wood*, 708

SUNDAY.—See ANNUAL LABOR, 10.

SURFACE SUPPORT.

1. *Ordinary precautions.—The accident proves the negligence.*—A coal mining lease contained a clause under which it was claimed that the lessor should save the lessee harmless from any damages that might accrue to surface owners, provided the lessee should take "all ordinary precautions usually taken in mining and removing coal." *Held*, that the result, the subsidence of the surface, was conclusive proof that ordinary precautions had not been taken. *Youghiogheny R. C. Co. v. Hopkins*, 188
 2. *Ordinary precautions* mean in mining coal, proper support to the overlying surface. *Id.*
 3. *The right by deed* to mine the coal subject to the condition that the surface shall not be broken or displaced is no enlargement of the miner's right, but leaves him to the liability as by common law. *Noonan v. Pardee*, 517
 4. *The owner of the subjacent estate owes support to the surface* absolutely without regard to good or bad mining or the amount of coal that remains ungotten. *Id.*
 5. *The right to mine on ground described and granted without liability* for surface support is no defense to an action for causing subsidence by destruction of the lateral supports by taking coal from adjoining land. *Matulys v. Philadelphia Co.*, 745
 6. *Absolute right of lateral support to soil only.*—The lateral support of the land, to which the owner thereof has an absolute right and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition and does not include support for the protection of buildings or improvements upon it. *Id.*
 7. *Buildings protected against negligence only.*—Negligence or want of due care in withdrawing lateral support in excavating or mining adjoining land for which there is liability for injury to a neighbor's buildings means positive negligence, or manifest want of due care in the excavations or mining so far as they affect, or are likely to affect, adjoining improvements. *Id.*
- See INSPECTION, 1; LATERAL SUPPORT; MEASURE OF DAMAGES, 3; STATUTE OF LIMITATIONS, 5-11.

TAILINGS.

1. *Impounding dams.*—Where the debris from hydraulic mining accumulates to the destruction of agricultural lands below such mining will be enjoined but with leave to defendants to erect impounding dams such as will allow the mining to continue without injury to the lower proprietors. *York v. Davidson*, 452
2. *Coal tailings restrained.*—Where a coal mining company so

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TAILINGS. *Continued.*

conducts its operations as to cause a continuous discharge of culm into a stream, and the culm is carried down the stream, and continuously accumulates in a dam and race of a mill, equipped for both steam and water power, the owners of the mill are entitled to an injunction to restrain the continuance of the nuisance, and also to damages for the injuries sustained to the time of suit. *Keppel v. Lehigh O. Co.*, 605

3. *Measure of damages.*—In such a case the owners of the mill are entitled to recover as damages (1) the increased cost of running the mill by steam, in so far as it was made necessary by the diminished water power, occasioned by the introduction of culm and dirt by the defendant; and (2) the cost of cleaning out the culm and dirt from the dams and mill race. They are not entitled, however, to recover the cost of a new arrangement of gateways and sluices intended to keep the mill and the race clear in the future. The injunction will protect them from future interference. *Id.*

See NUISANCE.

TAX.

1. *Presumption of regular taxation.*—Under the authority of § 4, Art. 13, Const., and §§ 2504, 2566-2569, Rev. St. 1898, it is the duty of the county assessor of each county in which an incorporated city is situated to assess, in accordance with the provisions of § 2688, Rev. St. 1898, the taxable property in such city, and deliver a copy of that part of his assessment roll containing the assessment of such city property to the city auditor. Thereafter such assessment roll may be used by the city authorities, as provided in said section, in levying taxes for general municipal purposes; and when the acts of the assessor are in due form, and the tax regularly levied by the city authorities, and there is nothing on the face of the official proceedings to show that any officer acted illegally or superseded his authority, the acts of the assessor and city authorities are presumed to be valid until the contrary is shown. *Eureka Hill Co. v. Eureka*, 131

2. *Shaft taking ore under and also beyond town limits.*—The net proceeds of a mine are taxable at the place where the ores are taken to the surface through the main workings, and, being personal property, should be taxed as other personalty. *Id.*

TENANT FOR LIFE.

1. *No right to lease unopened mines.*—Where testator's will gave his wife a life estate in his lands, and directed that she should not sell any of the real estate, she had no authority to make

TENANT FOR LIFE. *Continued.*

a mining lease whereby the lessee might remove all the coal he desired, at a certain royalty, since such lease was a sale of real estate. *Hook v. Garfield Coal Co.*, 81

2. *Mines opened and abandoned.*—A life tenant has no implied authority to make a mining lease, where the mines were not in operation at the time of the vesting of the life estate. *Id.*

TENANTS IN COMMON.

1. *Where a co-tenant has obtained a receiver's receipt in his own name* to the exclusion of his co-tenants and in fraud of their rights, as they assert, they can bring their suit to have their interests declared without waiting for the issue of the patent. *Malaby v. Rice*, 29

2. *Need not protest.*—Although a rule of the Land Office allows an ousted co-tenant to protest against the application, the Land Office could not assume the judicial function of deciding the controverted point of the validity of the forfeiture. *Id.*

3. *Need not adverse.*—Where a co-tenant forfeits the interests of his co-tenants for failure to pay their proportion of the cost of annual labor and then applies for patent they are not bound to adverse, but can assert their rights by suit in equity, attacking the alleged forfeiture. *Id.*

See LIEN, 4; SPECIFIC PERFORMANCE, 1.

TENDER.—See VENDOR AND PURCHASER, 3.

TIME.—See LEASE, 5; MILL SITE, 2.

TOWNSITE.

1. *No valid lode to attack town site.*—In an action to restrain a trespass to a mining claim, a judgment for the defendant was properly rendered, where the court found that no valid discovery had been made on the lode, that the same had not been located or the boundaries marked in the prescribed manner, that no valuable mineral of the required classes was within the boundaries of the property, and that the defendant's title to the property was valid. *Regan v. Whittaker*, 309

TRESPASS.

1. *Authorizing lessee to mine third party's coal.*—One who knowingly assumes to grant to a mining company the right to mine coal belonging to a third party, and who receives the price

TRESPASS. *Continued.*

for coal so mined, is a trespasser, notwithstanding he does not participate in mining the coal other than by authorizing the mining company to do so. *Donovan v. Cons. C. Co.*, 91

See EXECUTORS AND ADMINISTRATORS, 1, 2; INJUNCTION, 7; MEASURE OF DAMAGES, 1.

TRIAL.

1. *Trial to the court.*—When a case is tried before a judge sitting without a jury, and a clear preponderance of competent, relevant, and material evidence supports the findings, the appellate court will not reverse because of errors in the court below in admitting incompetent, irrelevant, or immaterial evidence; for the presumption in such case is that it was wholly disregarded. *Wells v. Davis*, 1

2. *Intimation of pre-judgment by court.*—Where, during the examination of a witness for defendants on an application for an injunction, the judge remarked that an injunction pendente lite would be granted on the evidence then before the court, such action does not constitute reversible error, he having heard the whole case before finally deciding that such injunction should issue. *Maloney v. King*, 278

3. *In equity cases documentary evidence* need not be offered before the referee, but may be first produced at the final hearing. *Crown Point M. C. Co. v. Crismon*, 406

4. *Waiver of error.—Remarks of counsel.*—Counsel cannot necessitate a new trial by their own failure to interpose seasonable objection to remarks of adverse counsel; and, where on the first objection, the court excluded the objectionable remarks from the consideration of the jury, there was no reversible error. *Portland M. Co. v. Flaherty*, 556

TRUST.

1. *Trustee becoming both vendor and vendee.*—Where the trustee without the full knowledge and consent of his *cestui que trust*, in dealing with the property, assumes to act as both vendor and vendee, the *cestui que trust* may avoid the transaction at his election without regard to its fairness or unfairness. *Glengary Cons. M. Co. v. Boehmer*, 74

2. *The legal presumption is that a trustee has no power to sell or transfer the subject of his trust.* *Geyser-Marion Co. v. Stark*, 220

3. *The word "trustee" carries notice.*—A corporate record and certificate of ownership of stock by A. B., trustee, is notice to the

TRUST. *Continued.*

corporation that he holds it, without the power of disposition, for some *cestui que trust*. *Id.*

4. *It is actionable negligence for the corporation to cancel the certificate and transfer the stock on the signature of the trustee to the assignment, without any inquiry for the cestui que trust, or for his assent to the transfer. Id.*

5. *Trustee deciding doubts against his beneficiary.*—A trustee took conveyance of about 260 acres of placer ground under agreement to apply for patent. Upon issue of the patent the purchase price of the tract was to be paid over, the trustee taking the deed only as a means to perfect the title. He applied and got the patent omitting from the application one claim of 15 acres, believing the location of that claim to be void. *Held*, that in a doubtful case the trustee was bound to make application and let the Land Department decide, and that the vendor was entitled to the money in full the same as if the trustee had secured patent on such 15 acres. *Stephens v. Wood*, 443

See CORPORATIONS, 1; FRAUD, 3.

TUNNEL.

1. *Six months' failure to work forfeits Blind Lodes.*—The provisions of Section 2323, Rev. St. U. S., and the privilege granted thereby, apply to one who locates a tunnel for discovery purposes as well as for development purposes; but failure to prosecute work on such a tunnel for six months works an abandonment of the right to all undiscovered veins on the line of such tunnel, and the owner of such tunnel is not entitled to a blind vein subsequently discovered, but only to the bore of the tunnel, and a space of surface ground 50 feet on each side of the mouth of the tunnel, and 100 feet extending in front thereof for dumping purposes. *Fissure Co. v. Old Susan Co.*, 125

2. *Neither the fact that the tunnel was not recorded as a tunnel site, nor that its mouth was not within the lines of the claim nor that it had been run through the patented ground of strangers, invalidates such tunnel discovery.* *Brewster v. Shoemaker*, 155

3. *Blind veins* underneath prior lode claims belong to the surface location under U. S. Rev. St. § 2322, and their discovery by running a tunnel, under § 2323, does not give the owner of the tunnel any right to them. *Calhoun M. Co. v. Ajax M. Co.*, 381

4. *The location of a tunnel site for mining purposes must be made in subordination to prior lode claims, and the tunnel has no right of way through them. Id.*

See DISCOVERY SHAFT, 3; PARTNERSHIP, 2; WATER, 2.

VARIANCE.

1. *There should be no reversal for variance* where the complaint is good against general demurrer and the appellant has not been misled. *Carter v. Rhodes*, 695

VENDOR AND PURCHASER.

1. *Severable contract*.—Defendant's assignor took an option for the purchase of a lease, some stock and an interest in a tunnel site. *Held*, a severable contract and that the lease being delivered upon the first payment defendant was entitled to hold the lease though he declined to carry out the other terms of the option. *Hardwick v. McClurg*, 412

2. *Facts of the case*.—Defendant's assignor agreed to buy stock, a lease, and an interest in a tunnel site, to be paid for one dollar down, a certain sum in 10 days, and a certain sum every 90 days until the whole amount was paid. The lease was to be assigned on payment of the sum due in 10 days, the stock to be delivered proportionately as payments were made, and a deed to the tunnel site delivered on final payment, it being understood that the contract constituted an option to purchase all of the property at the price named, and, in default of payment as provided, the stock and deed to be re-delivered to plaintiff. Plaintiff assigned the lease to defendant on payment of the amount due in 10 days, and sued for a reassignment of the lease on defendant's failure to make the other payments. *Held*, that he could not recover, since the contract was unilateral, and defendant was entitled to an assignment of the lease on the payment which he had made, to reassign which there was no special agreement. *Id.*

3. *A return or offer to return the consideration* paid, must be made before a party is entitled to rescission. *Stephens v. Wood*, 443

4. *Price payable out of proceeds*.—Where a contract for the sale of an interest in a mine provided that a balance of the purchase price was to be paid only out of the net proceeds of the working of the interest conveyed, and in no event was to become a personal claim against the purchaser, but subsequently the vendor agreed to permit the purchaser to sell his interest, provided the purchaser would become personally responsible for the balance due, there was sufficient consideration for such subsequent agreement, and the vendor was entitled to recover. *Carter v. Rhodes*, 695

5. *Voluntarily placing it beyond power to perform*.—The purchaser, by selling the interest, rendered it impossible for the vendor to recover the balance due from the net proceeds thereof, and at once became personally responsible for such balance. *Id.*

See FIXTURES, 1; TRUST, 1, 2, 5.

VENTILATION—See NEGLIGENCE, 3-5.

WAIVER—See FORFEITURE, 4; TRIAL, 4.

WATER.

1. *The water right an easement only.*—A vested right to the use of water for milling purposes carries with it the appurtenant right of way for a ditch through which to divert the water to the place of use, but it does not carry with it as an appurtenance a right to the land on which the mill is constructed. *Cleary v. Skiffich*, 284

2. *Drainage from tunnel not a natural stream.*—Where all the waters flowing through a tunnel are derived from drainage of a mine and of the country between the mine and the mouth of the tunnel, and from pumpings into the tunnel from lower levels, and the water which has been used in the mine for electrical purposes, such tunnel is not a natural stream, and its waters are not subject to appropriation. *Cardelli v. Comstock T. Co.*, 699

3. *Irrigation ditch below placer dump.*—No vested rights by mere license.—Where plaintiff's grantors entered on the placer ground of defendants, on which the waters of a stream were then being used for placer mining purposes, and without the knowledge or consent of defendants constructed a ditch which diverted water after it had passed over the placer flume, but before it returned to the creek, and defendants acquiesced in the diversion, the grantor acquired only the rights of a licensee, and plaintiff could not enjoin the pollution of the stream by the turning of another body of water into it. *Fairplay M. Co. v. Weston*, 725

See ABANDONMENT, 5; APPURTENANCES.

WAY—See TUNNEL, 4.

WEIGHTS AND MEASURES.

1. *Where the long ton of 2,240 pounds is specified in the contract referring to one size of coal, it will be assumed that the long ton was intended as to all the other sizes.* *Johnston v. Filer*, 741

WORKINGS.

1. *On a contract to sink a shaft so many feet beyond its present depth, it will be held that it was intended the contractors should keep the pitch of the old shaft and not that it should follow the vein.* *Buckeye Mining Co. v. Carlson*, 499

2. *After the shaft was many feet below the point where it was alleged to leave the vein, the owners made a payment in full for the work then done. This precluded them from later asserting that contractors were bound to follow the vein.* *Id.*

See INSTROKE.

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